Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States

DIANA CASEY, *et al.*,
Petitioners,

v.

RETIREMENT BOARD OF THE RHODE ISLAND EMPLOYEES' RETIREMENT SYSTEM, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When a legislatively-established public employee retirement system does not by its terms expressly create or disclaim a contractual relationship between the state and the members of the system, is a state statute that retroactively abrogates the retirement benefits of members exempt from scrutiny under the Contract Clause of the United States Constitution on the ground that the members' entitlement to such benefits is not contractual in nature, even though at the time of the abrogation the retirement benefits were "vested," and many of the members already had retired and were receiving the retirement benefits?

PARTIES

Petitioners are Diana Casey, Edward Casey, Robert Casey, Bernard Connerton, Denise Felice, Joseph Grande, Gloria Heisler, Robert Joy, Cornelius McAuliffe, Edward McElroy, Ronald DiOrio, Harvey Press, Bernard Singleton, and the Rhode Island Federation of Teachers.

Respondents are the Retirement Board of the Rhode Island Employees' Retirement System; Nancy Mayer, Chairperson and Treasurer of the Retirement Board of the Rhode Island Employees' Retirement System in her official capacity; and Joann Flaminio, Executive Director of the Retirement Board of the Rhode Island Employees' Retirement System in her official capacity.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit in *National Education Association-Rhode Island v. Retirement Board of the Rhode Island Employees' Retirement System*, 172 F.3d 22 (1st Cir. 1999).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 172 F.3d 22, and is reproduced in the Appendix to this Petition ("App.") at 1a. The judgment of the United States District Court for the District of Rhode Island is unreported and is repro-

duced in the Appendix at 19a. The opinion of the district court on the parties' cross-motions for summary judgment is reported at 972 F. Supp. 100, and is reproduced in the Appendix at 24a. The opinion of the district court denying defendants' motion to dismiss is reported at 890 F. Supp. 1143, and is reproduced in the Appendix at 67a.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on March 24, 1999. A timely Petition for Rehearing and Rehearing En Banc was denied by order entered May 5, 1999. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Contract Clause of the United States Constitution, U.S. Const. art. I, § 10, cl. 1, provides in pertinent part as follows: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . ."

R.I. Gen. Laws § 36-9-33 (repealed) is reproduced in the Appendix at 116a. The text of 1988 R.I. Pub. Laws ch. 486 is reproduced in the Appendix at 118a. R.I. Gen. Laws §§ 36-9.1-1 to -2 is reproduced in the Appendix at 119a.

STATEMENT OF THE CASE

A. Factual Background

At issue in this lawsuit is a statute that was enacted by the Rhode Island legislature on July 15, 1994—R.I. Gen. Laws §§ 36-9.1-1 to -2—which evicted petitioners from the Rhode Island State Employees' Retirement System ("Retirement System"), and retroactively abrogated certain retirement benefits to which they were entitled ("Evic-

tion Act"). As of the effective date of the Eviction Act, many of the petitioners already had retired and were receiving their retirement benefits. The remaining petitioners still were actively employed on July 15, 1994, but their benefits were "vested" because they had met the Retirement System's years-of-service vesting requirement.

The retirement benefits in question had been acquired by petitioners pursuant to a statute that had been enacted by the Rhode Island legislature seven years earlier—on July 3, 1987. This latter statute—R.I. Gen. Laws § 36-9-33—enabled full-time employees of unions that represent Rhode Island public employees in collective bargaining to become members of the Retirement System, § 36-9-33(a), and to purchase credits for past years of such union employment, § 36-9-33(b). In allowing these employees to participate in the Retirement System, Rhode Island was following the lead of the federal government and at least ten other states,[1] with the apparent goal of encouraging unions that represent the state's workforce to recruit their own staffs from among the employees that they represent.[2]

Shortly after § 36-9-33 was enacted, it became the object of heated political controversy, and eleven months later—on June 6, 1988—the Rhode Island legislature

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1 *See* 5 U.S.C. § 8411(e); Alaska Stat. § 14.25.045; Fla. Stat. § 238.01(3); Ga. Code Ann § 47-3-1(28)(N); Ill. Rev. Stat. Ch. 40 para. 5/16-106(8); Ky. Rev. Stat. Ann. § 161.220(4)(f); La. Rev. Stat. Ann. § 11:701(23); N.D. Cent. Code § 15-39.1-04(11)(b); S.C. Code Ann. § 9-1-10(4)(e); Wash. Rev. Code § 41.40.023(11); Wyo. Stat. § 9-3-402(a)(vi)(F), (H).

2 While petitioners came within the purview of § 36-9-33 because they were or had been employees of the type of union referenced in the statute, most if not all of them were, or at some point in their careers had been, public school teachers or other public employees. Accordingly, many of the petitioners already were members of the Retirement System when § 36-9-33 was enacted.

repealed the statute. 1988 R.I. Pub. Laws ch. 486. In 1989, a state court held that the repeal was prospective only and thus did not affect petitioners—all of whom had taken the steps necessary to exercise their rights under § 36-9-33 prior to its repeal. That holding was not appealed, and for approximately the next four years § 36-9-33 was implemented as to petitioners,[3] many of whom made important career and personal decisions in reliance on the retirement benefits that they had acquired pursuant to the statute.

In 1994, § 36-9-33 again became a politically charged issue in Rhode Island politics. During that year's session of the Rhode Island legislature, bills were introduced in both houses of the legislature to undo the remaining effects of § 36-9-33. These bills evicted from the Retirement System the few individuals who had become members of the System by virtue of § 36-9-33, and retroactively abrogated any entitlement to retirement benefits that had been acquired pursuant to the statute. The proposed bills were politically popular and—despite concerns by many legislators about their constitutionality[4]—were enacted.

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[3] The Retirement System is a "contributory" system, and petitioners began contributing 7.5% of their salaries, which was the same rate of contribution as that for all other members of the System. Similarly, the unions that employed petitioners became "employers" in the Retirement System, and began making the standard employer's contribution on their behalf.

[4] As the Chairman of the House Judiciary Committee candidly admitted during the floor debate:

> I don't have the guts to vote against the bill because I can't explain it in 25 words or less to my constituents . . . . In my six years up here, never have I ever heard so much, so many doubts about the constitutionality of something we're proposing to do.

Proceedings at Hearing in Re: Discussions Regarding # 94 H-9040, Before the General Assembly, June 16, 1994.

On July 15, 1994—the date on which the Eviction Act became effective—the abrogated retirement benefits of petitioners were "vested" because petitioners had met the Retirement System's vesting requirement of ten years of credited service. Indeed, as of that date, a number of petitioners already had retired and were receiving their retirement benefits. Although some of these petitioners had made the irrevocable decision to retire in reliance on the retirement benefits to which they were entitled under § 36-9-33, these benefits were totally abrogated as a result of the Eviction Act.[5]

B. Proceedings Below

This lawsuit was brought by 21 individual plaintiffs (including petitioners), as well as the two unions that had employed them and that, pursuant to § 36-9-33, had become "employers" under the Retirement System. Plaintiffs challenged the constitutionality of the Eviction Act under the Contract, Takings, and Due Process Clauses of the United States Constitution. They sought declaratory and injunctive relief, as well as restoration of monies lost because of their eviction from the Retirement System and the abrogation of the retirement benefits to which they had been entitled. Federal jurisdiction was based on 28 U.S.C. §§ 1331 and 1343(3).[6]

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[5] To cite but one example, petitioner Gloria Heisler retired from her job as a public school teacher in 1990 at age 62. At the time of her retirement, Heisler had been a teacher and member of the Retirement System for nearly 20 years and had acquired tenure in her position. Heisler had purchased credits for earlier union employment (as a secretary) pursuant to § 36-9-33(b). Four years after Heisler's retirement, her retirement benefits were cut nearly in half as a result of the Eviction Act, notwithstanding that she had relied on the benefits promised to her under § 36-9-33 when she decided to retire at age 62 rather than continue working.

[6] One additional plaintiff, Richard DeOrsey, was subsequently permitted to intervene in the lawsuit. DeOrsey, who was unsuccess-

Defendants moved to dismiss, but the district court (Hon. Ronald R. Lagueux) denied their motions in a decision issued on July 7, 1995. App. 67a. Focusing principally on the Contract Cause, the court applied the traditional three-prong inquiry—*i.e.*, (1) whether the challenged statute infringed upon a right arising from a "contractual agreement," (2) if so, whether that contractual right had been "substantially impaired," and (3), if there was such impairment, whether it was "reasonable and necessary to serve an important public purpose." *Id.* at 76a-77a.

The district court held that, on the facts alleged in the complaint, an implied-in-fact contract had been created between plaintiffs and the Retirement System. *Id.* at 77a-103a. The court also found that the Eviction Act had "substantially impair[ed]" that contractual relationship. *Id.* at 102a-103a. With regard to the final step of the Contract Clause inquiry, the court described defendants' asserted justifications for the Eviction Act as "conclusory" and "disingenuous," but noted that factual development was required to determine whether defendants could satisfy the "reasonable and necessary" standard. *Id.* at 103a-106a.

After discovery, the parties cross-moved for summary judgment, and on August 7, 1997, the district court ruled on these motions. App. 24a. Relying principally on the Takings Clause, rather than the Contract Clause, *see id.* at 50a-59a, the court found the determinative question to be whether, at the time of enactment of the Eviction Act, a particular plaintiff's retirement benefits had "vested."

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ful in the trial court, filed a separate appeal with the First Circuit. Although his appeal was heard and decided together with petitioners' appeal, the Court of Appeals denied a motion to consolidate the appeals. Accordingly, DeOrsey is not a party to this Petition.

App. 50a.[7] Accordingly, the court declared the Eviction Act unconstitutional as applied to those plaintiffs who, as of July 15, 1994, had met what the court understood to be the Retirement System's requirement for vesting, and it upheld the Act as applied to those plaintiffs who, as of that date, had not met that requirement. After the resolution of certain factual issues with respect to several of the plaintiffs, the court entered judgment on June 2, 1998. App. 19a.

Defendants appealed, arguing, in pertinent part, that none of the plaintiffs had a contractual right to any retirement benefits acquired pursuant to § 36-9-33. Certain of the nonprevailing plaintiffs cross-appealed. These plaintiffs did not quarrel with the fact that the district court had distinguished between vested and non-vested retirement benefits, but contended that the court had misunderstood the Retirement System's requirement for vesting.[8] Following briefing and argument, a panel of the Court of Appeals (per Boudin, J.) ruled in favor of defendants. The court held that none of the plaintiffs had a contrac-

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[7] Retirement systems generally—whether in the public or private sector—provide that a member's retirement benefits vest after the acquisition of a requisite number of years of credited service, although the employee may not be eligible to retire and actually draw those benefits until he or she reaches a specified age. *See* Bureau of Labor Statistics, U.S. Dep't of Labor, *Employee Benefits in State and Local Governments, 1994*, at 113-14 (1996).

[8] The district court had held that a member of the Retirement System must have acquired the requisite years of credited service *and* met the age requirement for retirement in order to have a vested right to retirement benefits. The cross-appellants, who had the requisite years of credited service but had not yet attained retirement age, relied, *inter alia*, on R.I. Gen. Laws § 36-10-11, which expressly provides that a member's rights vest upon completion of ten years of service, regardless of whether the member has reached retirement age. The First Circuit did not reach this issue, and, accordingly, it is not implicated in this Petition.

tually enforceable right to their § 36-9-33 retirement benefits, and the state therefore was free to abrogate them at will. App. 10a-11a.

The First Circuit began its analysis by observing that, with regard to private-sector retirement systems, "a substantial body of case law treats such plans as implied contracts, protecting at least those whose rights have 'vested.' " *Id.* at 8a. In the public sector, the court stated, the law is "less settled." *Id.* Citing this Court's 1937 decision in *Dodge v. Board of Education,* 302 U.S. 74, 78-79 (1937), the First Circuit noted that "Supreme Court precedent has tended to treat government pension statutes as . . . subject to modification for payments not yet made, unless the government's intent to create a contract is clear and definite." App. 9a. And, the court "d[id] not think that the Rhode Island general pension statute 'clearly and unequivocally' *contracts* for future benefits." *Id.* at 10a (emphasis in original) (quoting *National R.R. Passenger Corp. v. Atchinson, Topeka & Santa Fe Ry. Co.,* 470 U.S. 451, 465-66 (1985) ("*Amtrak*")). The court emphasized in this regard that "[n]owhere does the statute call the pension plan a 'contract' or contain an anti-retroactivity clause as to future changes." *Id.* at 11a.

Plaintiffs had relied, *inter alia,* on the provision in the Retirement System that "[t]he right of a service retirement allowance under the provisions of this chapter *shall vest* in a member" who satisfies the requisite years-of-service requirement, R.I. Gen. Laws § 36-10-11 (emphasis added), but the First Circuit found this reliance misplaced. Unlike the district court, the court below did not consider "vesting" determinative—or, indeed, even relevant—as to the existence *vel non* of contractual rights. "Vesting," said the court, indicated nothing more than eligibility for retirement benefits upon the attainment of

retirement age: "Whether a plan affords contractual protections against a change in its terms is a different question." App. 11a.

Having concluded that the statutory language did not "clearly and unequivocally" create contractual rights, the First Circuit then "turn[ed] from language to circumstances," *id.* at 12a, but it found nothing in the circumstances surrounding enactment or implementation of the Retirement System, or the status of plaintiffs, that would warrant treating the retirement benefits in question as contractual. The court observed that, although "it is true that *today* private pensions are often conceived and crafted more as deferred compensation than as gifts," *id.* at 12a (emphasis in original), "Rhode Island's general pension plan was created in 1936 when the view of pensions taken in *Dodge* was quite widespread." *Id.* at 12a. Declaring that "the clear statement rule [of *Amtrak*] is binding unless and until altered by the Supreme Court," *id.* at 13a, and that it would be a "conundrum" to hold that a " 'statutory' contract" could satisfy that rule "by . . . implication rather than clear language," *id.*, the First Circuit held that none of the petitioners had a contractual claim.

Having resolved petitioners' Contract Clause claim on that basis, the First Circuit had no occasion to address the second and third prongs of the Contract Clause inquiry—*i.e.*, whether petitioners' contractual rights had been "substantially impaired," and whether any such impairment was "reasonable and necessary to serve an important public purpose." [9]

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[9] The court also rejected petitioners' claims under the Takings and Due Process Clauses (even though the latter claim had not been pursued on appeal). App. 13a-18a. These alternative grounds for relief are not raised by this Petition.

REASONS FOR GRANTING THE WRIT

There are at the present time over 2,000 state and local government retirement systems in existence, with more than ten million members. *See* Employee Benefit Research Institute, *EBRI Databook on Employee Benefits* 148 (4th ed. 1997). Unlike their private-sector counterparts, these members of public-sector retirement systems cannot look to the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"), to assure that they will in fact receive the retirement benefits that have been promised to them: ERISA does no apply in the public sector. *See* 29 U.S.C. § 1003(b)(1). Nor can these public employee members find such assurance in collective bargaining agreements that have been negotiated by their unions: because public-sector retirement systems invariably are established by statute, the retirement benefits of public employees are in most jurisdictions not an appropriate subject of bargaining. Accordingly, when government attempts to abrogate or modify the retirement benefits for which public employees have become eligible, these employees must look elsewhere for protection —and the source of law most commonly invoked in this regard is the Contract Clause of the United States Constitution.

This lawsuit involves application of the Contract Clause to a state retirement system.[10] Specifically at issue is the first prong of the Contract Clause inquiry—*i.e.*, whether, and under what circumstances, a state retirement system establishes a contractual relationship between the state and the members of the system so as to trigger constitu-

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[10] For this reason, we use the term "state retirement system" in this Petition. The analysis extends, however, to any non-federal public sector retirement system, including the large number of such systems that have been established by local governments.

tional scrutiny.[11] With regard to some state retirement systems, this inquiry need go no further than the statutory language itself. Thus, the legislature may have expressly declared that the rights created under the system are contractual.[12] In other cases, the statute expressly may disclaim a contractual relationship—through, for example, an explicit reservation by the state of the right to abrogate or amend the benefits provided by the retirement system.[13] But these are exceptions to the rule, and

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[11] Whether a contract was formed for purposes of the Contract Clause is a matter of federal law, as to which the federal courts "can not surrender the duty to exercise [their] own judgment." *General Motors Corp. v. Romein*, 503 U.S. 181, 187 (1992) (internal quotations and citation omitted). As indicated, if this threshold question is answered in the affirmative, the next step is to determine whether the claimant's contractual rights have been substantially impaired, and, if so, whether that impairment was "reasonable and necessary to serve an important public purpose." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 25 (1977). These latter questions are not implicated by this Petition: inasmuch as the First Circuit denied all relief on the ground that petitioners had *no* contractual rights, it is only the existence *vel non* of a contractual relationship that is before this Court.

[12] *See, e.g.*, N.Y. Const. art. V, § 7 ("membership in any pension or retirement system of the state or of a civil division thereof is to be a contractual relationship, the benefits of which shall not be diminished or impaired"); Mass. Gen. L. ch. 32, § 25(5) (establishing membership in the Massachusetts Retirement System "as a contractual relationship under which members . . . are entitled to contractual rights and benefits, and no amendments or alterations shall be made that will deprive any such member or any group of such members of their pension rights or benefits . . .").

[13] *See, e.g.*, 74 Pa. Cons. Stat. § 1724(c) (under retirement system of public transportation authority, benefits may be "modified from time to time"); R.I. Gen. Laws § 45-21-47 (Rhode Island's *Municipal* Employees' Retirement System, which states that "[t]he right to amend, alter, or repeal this chapter at any time or from time to time is expressly reserved . . ."). While a provision reserving the right to modify or repeal a state retirement system is not necessarily dispositive, *see McGrath v. Rhode Island Retirement Board*,

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the typical state retirement system does not, by its terms, expressly create or disclaim a contractual obligation on the part of the state.

What we have in this lawsuit is such a typical state retirement system. Because the court below held that there was no contractual relationship *even as to* those petitioners who already had retired and were receiving their retirement benefits when the Eviction Act was enacted, its decision can only be read to mean that the members of the vast majority of state retirement systems—*i.e.*, those in which the statutory language does not expressly indicate whether or not a contractual relationship is established—*never* acquire rights to their retirement benefits that are protected by the Contract Clause.[14] This surely cannot be correct, and if the First Circuit simply had misapplied settled law, it would be appropriate and sufficient for this Court to summarily reverse.

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88 F.3d 12, 17-18 (1st Cir. 1996), such a provision at least casts the inquiry in a different light.

[14] The court below left open the possibility that petitioners' rights to retirement benefits might be of a lesser quality than those of "long-time state employees," on the ground that "these particular plaintiffs do not have the benefit of a clear and longstanding employer-employee relationship *with the government*." App. 12a (emphasis in original). The purported distinction is untenable. All of the petitioners had an "employer-employee relationship" with an entity that the Rhode Island legislature, in enacting § 36-9-33, determined should be treated as a public employer for purposes of the Retirement System. That employment relationship —alone or in combination with other covered employment—was sufficiently "longstanding" for all of the petitioners to have obtained the requisite ten years of service for their retirement benefits to become vested. Because there is, thus, no conceivable legal basis for analyzing petitioners' rights under the Retirement System any differently from those of other members of the System, the First Circuit's analysis necessarily applies to all members of the Retirement System at issue in this lawsuit, and more generally to public employee members of other state retirement systems as well.

But the law in this area is anything but settled, and the decision of the court below—which we note in passing is analytically inconsistent with another First Circuit decision decided only three years earlier[15]—is reflective of the general confusion that exists among state and lower federal courts as to the application of the Contract Clause to the vast majority of state retirement systems, which do not by their terms expressly create or disclaim a contractual relationship between the state and the members of the system. As one federal appellate court has put it, this is "a legal issue of considerable importance," *Parker v. Wakelin*, 123 F.3d 1, 4 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 1675 (1998), the answer to which "varies greatly from state to state, and has not been the subject of federal regulation or harmonization." *Id.* at 6. Although this Court recently has set forth the general standard to be applied in determining whether a legislative enactment creates a contractual obligation, *see Amtrak*, 470 U.S. at 465-66, its principal decision addressing that question in the specific context of a state retirement system, *Pennie v. Reis*, 132 U.S. 464 (1889), is over a century old and largely has "been ignored as a precedent." *Parker*, 123 F.3d at 6.

This Court should grant review in order (1) to determine whether the position that it took more than a hundred years ago in *Pennie* has any continuing vitality; and, if not, (2) to establish an analytical framework that can be applied by state and lower federal courts so as to produce some measure of uniformity in how they deal with this important question of federal law.

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[15] In *McGrath v. Rhode Island Retirement Bd.*, *supra*, involving Rhode Island's *Municipal* Employees' Retirement System, the court recognized that this "principle that a pension plan represents an implied-in-fact unilateral contract . . . has been applied repeatedly to state and municipal pension plans," as well as to those in the private sector. 88 F.3d at 17 (citing cases).

I. *PENNIE v. REIS*

As indicated above, this Court's principal precedent addressing the contractual nature *vel non* of a state retirement system is *Pennie v. Reis*, a case decided more than a hundred years ago under the Due Process Clause. In *Pennie*, this Court viewed the retirement benefits of public employees as gratuities that were "subject to change or revocation at any time, at the will of the Legislature." 132 U.S. at 471. It added: "There was no contract on the part of the State that its disposition should always continue as originally provided." *Id.* This Court subsequently applied *Pennie* in the 1930s in *Dodge v. Board of Education*, 302 U.S. 74 (1937), in which it affirmed a decision of the Illinois Supreme Court that a statute decreasing the retirement benefits paid to retired Chicago public school teachers under a state retirement system did not violate the Contract Clause.

In the century since it was decided, *Pennie*'s "reasoning has been widely—and justifiably—criticized." Note, *Public Employee Pensions in Times of Financial Distress*, 90 Harv. L. Rev. 992, 994 (1977). As the First Circuit has observed, while *Pennie*'s "'gratuity' approach has been rejected by most state courts, *Pennie* has never been explicitly overruled. . . . *Pennie* has, however, been ignored as a precedent . . ." *Parker*, 123 F.3d at 6; *see also McGrath*, 88 F.3d at 16 (noting that *Pennie*'s view of retirement benefits "as mere gratuities" has been abandoned under "evolving legal doctrine"); *Transport Workers, Local 290 v. SEPTA*, 145 F.3d 619, 623 (3d Cir. 1998) ("While *Pennie* has never been expressly overruled, most state supreme courts subsequently rejected the 'gratuity' approach in favor of an approach that viewed such programs as creating implied-in-fact unilateral contracts"). Indeed, as we demonstrate below, the mere notion that public-sector retirement benefits are no more than "gra-

tuities" has been rejected not only "by most state courts," but also by the three other federal circuits to have addressed the issue.

In view of the disconnect between the stated position of this Court—*i.e.*, that public-sector retirement benefits are no more than mere "gratuities" revocable at will—and the rejection of that position by the vast majority of courts, it is time for this Court once again to address the issue in order to provide guidance that reflects a modern understanding of the nature and purpose of state retirement systems. Because, as this Court repeatedly has instructed state and lower federal courts, they are obligated to apply this Court's existing precedents even when those precedents have been undermined by more recent legal developments, *see Agostini v. Felton*, 521 U.S. 203, 237 (1997); *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997), it is imperative that this Court revisit an issue such as this one where its teaching is so clearly out of line with the development of the law.

II. CONFLICT AMONG LOWER COURTS

In the absence of contemporary guidance from this Court, state and lower federal courts have adopted conflicting views regarding the contractual nature *vel non* of retirement benefits provided by state retirement systems that do not expressly speak to the issue.

A. The "gratuity" approach adopted in *Pennie* continues to have some adherents—including presumably the court below—but very few. *See Cook v. Employees Retirement Sys.*, 514 S.W.2d 329, 331 (Tex. Civ. App. 1974); *Ballard v. Board of Trustees*, 324 N.E.2d 813, 815 (Ind. 1975).

B. Most courts have adopted what the Ninth Circuit has characterized as "the modern and better-reasoned view" that public employees have contractual rights under

state retirement systems, and that those rights accrue from the commencement of covered employment. *Nevada Employees' Ass'n, Inc. v. Keating*, 903 F.2d 1223, 1227 (9th Cir.), *cert. denied*, 498 U.S. 999 (1990). This view has been adopted by the majority of state appellate courts that have addressed the issue.[16]

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[16] *See Yeazell v. Copins*, 402 P.2d 541, 545 (Ariz. 1965); *Betts v. Board of Admin. of the Pub. Employees' Retirement Sys.*, 582 P.2d 614, 617 (Cal. 1978); *Police Pension and Relief Bd. v. Bills*, 366 P.2d 581, 584 (Colo. 1961); *Nash v. Boise City Fire Dept.*, 663 P.2d 1105, 1108-10 (Idaho 1983); *Brazelton v. Kansas Pub. Employees Retirement Sys.*, 607 P.2d 510, 514 (Kan. 1980); *City of Frederick v. Quinn*, 371 A.2d 724, 726 (Md. App. 1977); *Campbell v. Michigan Judges' Retirement Bd.*, 143 N.W.2d 755, 757-58 (Mich. 1966); *Sylvestre v. State*, 214 N.W.2d 658, 666-67 (Minn. 1973); *Halpin v. Nebraska State Patrolmen's Retirement Sys.*, 320 N.W.2d 910, 914-16 (Neb. 1982); *Public Employees' Retirement Bd. v. Washoe County*, 615 P.2d 972, 974-75 (Nev. 1980); *Oregon State Police Officers' Ass'n v. State*, 918 P.2d 765, 779 (Ore. 1996); *Association of Pa. State Coll. and Univ. Faculties v. State Sys. of Higher Educ.*, 479 A.2d 962, 966 (Pa. 1984); *Burlington Fire Fighters Ass'n v. Burlington*, 543 A.2d 686, 689-90 (Vt. 1988); *Leonard v. City of Seattle*, 503 P.2d 741, 746 (Wash. 1972); *Wagoner v. Gainer*, 279 S.E.2d 636, 643-44 (W. Va. 1981).

Notwithstanding their agreement that a contract exists from the first day of employment, these jurisdictions differ as to the state's ability thereafter to modify the benefits provided by the retirement system. Several courts have held that the state may not unilaterally amend the system in derogation of the employee's contractual rights at any time. *See Yeazell*, 402 P.2d at 545 (a contract is complete when an employee accepts employment, and a "contract cannot be unilaterally modified nor can one party to a contract alter its terms without the assent of the other party"); *Sylvestre*, 214 N.W.2d at 666-67; *Campbell*, 143 N.W.2d at 757-58. Other courts allow for certain "reasonable modifications" of the existing contract. While the reasoning of these latter cases is not always clear, their limitations on the employee's contractual rights are best understood as based on the second and third prongs of Contract Clause analysis. Thus, as the Ninth Circuit explained in *Keating*, even though an employee has a contractual right to the retirement benefits in effect on the first day of his or her employment, if subsequent enactments "constitute[] a reasonable modifi-

C. Other courts, while agreeing that the retirement benefits provided by state retirement systems are contractual in nature, reject the principle that a contract exists as soon as a covered employee begins to tender performance, and focus instead upon the completion of performance. In one view, the necessary performance is completed, and the retirement benefits are contractually protected, when they become "vested"—which under virtually all state retirement systems is when the employee satisfies the system's years-of-service requirement. *See* Bureau of Labor Statistics, U.S. Dep't of Labor, *Employee Benefits in State and Local Government, 1994* 113-14 (1996). Illustrative of this approach are *Petras v. State Bd. of Pension Trustees,* 464 A.2d 894, 896 (Del. 1983), and *Blackwell v. Quarterly County Court,* 622 S.W.2d 535, 543 (Tenn. 1981).

A variant of this approach views contractually enforceable rights as accruing only when the employee has satisfied the state retirement system's years-of-service requirement *and* has reached retirement age, thus becoming eligible to actually retire and receive retirement benefits. *See Baker v. Oklahoma Firefighters Pension & Retirement Sys.*, 718 P.2d 348, 352-53 (Okla. 1986). Yet another variant is to treat retirement benefits as contractual only with respect to employees who already have retired, but not with respect to other employees. The Fourth Circuit and at least one state supreme court have taken this latter position. *See Kestler v. Board of Trustees of N.C. Retirement Sys.*, 48 F.3d 800, 803-04 (4th Cir.), *cert. denied,* 516 U.S. 868 (1995); *Florida Sheriffs Ass'n v. Department of Admin.*, 408 So. 2d 1033, 1036 (Fla. 1981).

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cation of the pension plan, then they [do] not create a substantial impairment of contractual obligations." 903 F.2d at 1227.

* * *

The "great diversity," *Baker*, 718 P.2d at 351, of views as to the contractual nature of retirement benefits provided by state retirement systems is manifest, and has been noted with concern by the lower courts. *See, e.g., Brazelton*, 607 P.2d at 514 (declining to write "a dissertation on the historical background of the various theories prevailing today"). To be sure, this diversity may to some extent be attributable to differences in the language and structure of the various state retirement systems. To a much larger extent, however, it is attributable to the absence of a controlling framework for Contract Clause analysis based on a modern understanding of the nature and purpose of state retirement systems. The decision of the Court below—which sustained the right of the Rhode Island legislature retroactively to abrogate vested retirement benefits, even as to those petitioners who already had retired and were receiving their retirement benefits—is at the extreme end of the spectrum of approaches that have been adopted by the lower courts, and presents in stark fashion the legal and equitable aspects of this important federal question. As such, it offers this Court a particularly appropriate vehicle to establish a set of guiding legal principles that lower courts can use to determine whether and when members of state retirement systems acquire rights that are protected by the Contract Clause.

Although a full explication of petitioners' views as to the appropriate relationship between the Contract Clause and state retirement systems must await briefing on the merits, it may be helpful to explain in summary terms why we believe the analysis of the First Circuit is flawed.

The court below correctly identified the general standard that this Court has established for determining when a statute gives rise to contractual rights—quoting the fol-

lowing passage from *National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Ry.* ("Amtrak"), 470 U.S. 451, 465-66 (1985):

> [A]bsent some clear indication that the legislature intends to bind itself contractually, the presumption is that "a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." *Dodge v. Board of Educ.*, 302 U.S. 74, 79 (1937) . . . . [T]he principal function of a legislature is not to make contracts, but to make laws that establish the policy of the state. . . . Policies, unlike contracts, are inherently subject to revision and repeal, and to construe laws as contracts when the obligation is not *clearly and unequivocally expressed* would be to limit drastically the essential powers of a legislative body.

App. 9a (emphasis added by First Circuit). Based upon this passage, the court concluded that the Retirement System could be construed as creating a contractual obligation only if the Rhode Island legislature's intent to bind itself was "clear[ ] and unequivocal[ ]." *Id.* at 10a. The First Circuit's error, we submit, was not so much in identifying this as the applicable standard,[17] but in applying it

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[17] *But see United States v. Winstar*, 518 U.S. 839, 879 (1996) (emphasis added) (limiting application of the "unmistakability doctrine" to situations in which "enforcement of the contractual obligation alleged would block the exercise of a *sovereign power* of the Government"). Indeed, in determining whether the benefits provided by state retirement systems come within the ambit of the Contract Clause, many state courts simply have applied general principles of contract law, without even recognizing a presumption against the creation of contractual rights. *See, e.g., AFSCME Councils 6, 14, 65 and 96 v. Sundquist*, 338 N.W.2d 560, 566 (Minn. 1983) (Minnesota follows a "conventional contract approach"); *Oregon State Police Officers' Ass'n*, 918 P.2d at 773 ("general principles of contract law govern the inquiry").

without regard to the nature and purpose of the particular statute involved.

Amtrak, and most of the other cases in which this Court recently has had occasion to address the question of whether legislative enactments are contractual in nature, have involved what the *Amtrak* Court termed "regulatory statute[s]." 470 U.S. 466. But a state retirement system is not a regulatory statute. It is rather a statute affecting the employment relationship, and "the promise of a pension is part of the compensation package" that is "dangle[d] to attract and retain qualified employees." *McGrath*, 88 F.3d at 16-17.

This promise—fleshed out with specified contribution levels, defined retirement benefits, vesting after a fixed period of employment, etc.—is viewed by most employers and employees, in both the public and the private sectors, as part of the compensation to which an employee is entitled in exchange for the performance of services. *See, e.g., In re Almeida*, 611 A.2d 1375, 1386 (R.I. 1992) (public employee's right to retirement benefits "comprises elements of both the deferred compensation and the contract theories"). This entitlement is recognized and enforced in the private sector by ERISA, but even before ERISA it generally was accepted in that sector that "the promise of a pension constitutes an offer which, upon performance of the required service by the employee becomes a binding obligation." *Hoefel v. Atlas Tack Corp.*, 581 F.2d 1, 4 (1st Cir. 1978), *cert. denied*, 440 U.S. 913 (1979).[18]

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[18] In one of its early cases in this area, this Court compared statutory enactments governing public-sector retirement benefits to legislation "fixing salaries of [state] officers" or "fixing the term or tenure of a public officer or an employee of a state agency." *Dodge*, 302 U.S. at 78-79. Such legislation, said this Court,

In determining whether a state retirement system is intended to establish a contractual obligation, it is essential to consider the employee expectations that are created by such a system, and the employer's use of those expectations in attempting to compete in the labor market. Thus, statutory language that in other contexts might not be sufficient to indicate the legislature's "clear and unequivocal" intent to bind itself contractually, may well be sufficient to do so with regard to a statute affecting the employment relationship, intended to provide after-the-fact compensation for employees' services, and designed to attract and retain qualified employees.

* * *

As evidenced by the abundance of cases cited above—which represent only a sampling—the question of whether and when members of a state retirement system acquire rights that are protected by the Contract Clause is a recurring one in both federal and state courts. And, it is a question that has assumed increasing importance in recent years, as states have sought to reduce their financial

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> create[d] no contract in [the employees'] favor and the compensation named may be altered at the will of the legislature. . . . The presumption is that such a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.

Id. (The court below echoed this view: "After all, legislatures regularly modify compensation schedules and benefit programs." App. 9a.) Whatever the legal merit of that analogy, as an empirical matter the comparison between salaries and retirement benefits is inapt. When an employer alters an employee's salary, the alteration is *prospective*; it changes the employee's compensation for work that has not yet been performed, and an employee dissatisfied with the change is free to quit without having lost anything. The abrogation of promised retirement benefits, on the other hand, works a *retroactive* change in the compensation the employee receives for work *already performed*.

obligations under such systems in order to deal with budgetary shortfalls and other financial problems. *See* Roberta Romano, *Public Pension Fund Activism in Corporate Governance Reconsidered,* 93 Colum. L. Rev. 795, 802 (1993); Darryl B. Simko, *Of Public Pensions, State Constitutional Contract Protection, and Fiscal Constraint,* 69 Temple L. Rev. 1059, 1059-60 (1996). Until this Court provides an up-to-date legal framework for dealing with this question, millions of public employees will remain uncertain whether—in planning for the future—they can rely on the retirement benefits to which they are entitled under existing law.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Supreme Court, U.S.
FILED

(2)

No. —— 99 215 AUG 3 - 1999

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IN THE

Supreme Court of the United States

DIANA CASEY, *et al.*,
Petitioners,

v.

RETIREMENT BOARD OF THE RHODE ISLAND EMPLOYEES' RETIREMENT SYSTEM, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 98-1763
No. 98-1782

NATIONAL EDUCATION ASSOCIATION—RHODE ISLAND,
BY ITS SECRETARY, TIA SCIGULINSKY,
Plaintiffs, Appellees/
Cross-Appellants,

v.

RETIREMENT BOARD OF THE RHODE ISLAND
EMPLOYEES' RETIREMENT SYSTEM,
Defendants, Appellants/
Cross-Appellees.

RICHARD R. DEORSEY,
Plaintiff, Appellant.

Appeals from the United States District Court
for the District of Rhode Island

[Hon. Ronald R. Lagueux, *U.S. District Judge*]

Before Boudin, *Circuit Judge,* Aldrich, *Senior Circuit Judge,* and Shadur,* *Senior District Judge.*

March 24, 1999

BOUDIN, *Circuit Judge.* In 1936, Rhode Island created a retirement system for state employees, school teachers, and other employees of cities and towns that chose to participate. R.I. Gen. Laws §§ 36-8-1 to 36-10-39. The retirement system is administered by the Retirement Board ("the Board"), which is chaired by the state treasurer. R.I. Gen. Laws §§ 36-8-4, 36-8-9. The retirement system is a "defined benefit plan" in which benefits are determined not by the amount contributed during service but by a schedule of benefits that specifies the amount to be paid.

At present, benefits under the Rhode Island statute are set as a percentage of the average of the employee's salary earned during the three highest consecutive years of earnings, multiplied by the number of years of credited service. R.I. Gen. Laws § 36-10-10. An employee may retire and begin receiving payments at any age after 28 years of service or after reaching age 60 and completing 10 years of service. *Id.* § 36-10-9. Employees contribute a fixed percentage of annual earnings to the retirement system, but the state pays the balance needed to provide the scheduled benefit. *Id.* § 36-10-2.

In the 1980s, teachers' unions in Rhode Island sought legislation to allow employees of unions representing state

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* Of the Northern District of Illinois, sitting by designation.

employees including teachers to participate in the state retirement system; these union employees are not, at least in that capacity, public employees. Thus, the statute needed to be amended to permit them to receive benefits. In early 1987, a bill embodying such a proposal was introduced and placed on the legislature's consent calendar; and it was passed on the final day of the session without debate and apparently without much public notice.

The new provision, codified at R.I. Gen. Laws § 36-9-33, not only allowed union employees to join the retirement system, but also permitted them to purchase credit, on payment of a modest amount to the system, for all years previously served with the union.[1] This allowed the union employee to treat all prior years of employment by the union as years of public service needed to qualify for state pension benefits *and* to treat earnings from the union as if they were public compensation for purposes of computing the "highest three (3) consecutive years" average. *Id.* § 36-10-10.

Furthermore, the provision allowed union employees to receive pension benefits based on salaries over which the state had no control. Because the retirement system calculates benefits based on the average of the three highest consecutive years' salary (multiplied by a factor based on years of service), the *union* could raise salaries for pension-qualifying union employees and thereby boost their pension benefits from the state retirement system.

---

[1] The amount required for each year of credit was 10 percent of the union employee's *starting* salary. *See* R.I. Gen. laws § 36-9-33. By contrast, the benefit to be provided—as for state employees—was to be computed on the three highest consecutive years' average. *Id.* § 36-10-10.

The record reflects significant increases in union employee salaries following the passage of section 36-9-33.[2]

The effect, as more fully described below, was to allow a number of highly paid union officials to qualify for state pensions almost immediately in amounts greatly in excess of their contributions to the system. The pensions were in addition to, not in place of, whatever pensions were provided by the union. The district court later calculated the plaintiffs' total contribution to the Retirement System at $1,995,784, the present value of their projected pension benefits at about $11,430,579, and an average projected rate of return for the individual plaintiffs of aproximately 1250 percent.

When the situation became widely known, the legislature repealed section 36-9-33 *in toto* on June 9, 1988. *See* 1988 R.I. Pub. Laws ch. 486 ("the Repeal Act"). At that time, applications by union employees were pending before the Board, which had declined to process them. Despite the repeal, two teachers' unions filed suit in October 1988 and later succeeded in persuading a state court judge that the repeal was prospective only and did not permit the Board to exclude union employees who had sought to become members and purchase credits prior to the repeal. *See RIFT* v. *Retirement Sys.*, No. PC 88-4974 (R.I. Sup. Ct. Dec. 21, 1989).

As a result, qualified union employees then entered the retirement system, some retiring fairly soon after. Bernard Singleton, for example, became a member of the Retirement System effective January 1, 1990 (as did other

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[2] For example, Edward Casey earned a salary of $45,794.48 in 1987, $47,528.71 in 1988 and $50,645.40 in 1989. After he joined the state system, his union salary jumped to $59,965.61 (1990), then to $72,122.07 (1991), finally to $80,000 in the year he retired (1992).

individual plaintiffs) and promptly purchased roughly 25 years of service credit for his prior union employment at a cost of $25,411.09. On July 28, 1990, several months later, at age 52, he took "early retirement" and immediately began to collect a pension of approximately $53,000 per year, with an expected lifetime benefit of about $750,000.[3]

In July 1994, the legislature responded by "evicting" the union employees. *See* 1994 R.I. Pub. Laws ch. 413, § 1, codified at R.I. Gen. Laws § 36-9.1-1 *et seq.* ("the Eviction Act"). The new statute, which sparked the present litigation, terminated pensions for union employees who had entered under the now repealed statute. It provided for return of their contributions, with interest, reduced by any benefits they had received. *Id.* The Eviction Act stated that inclusion of union employees had "no rational relationship to any legitimate governmental purpose" and would invade the corpus in violation of the requirements of the Internal Revenue Code. *Id.* § 36-9.1-1.

Two teachers' unions and 22 present or former union employees then brought the present suit in the district court in July 1994 against the Board, its chairperson, and its executive director. The plaintiffs alleged that the Eviction Act violated the Contract, Takings and Due Process Clauses of the Constitution, *see* U.S. Const. art. I, § 10, cl. 1; *id.* amend. V; *id.* amend. XIV, and that

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[3] This was not a unique case. For example, Bernard Connerton contributed $27,072.88 and then retired in July 1990 at age 53 with an expected benefit close to $640,000. Edward Casey contributed $28,351.69 and then retired in December 1992 at age 56 with an expected benefit of more than $650,000. Ronald DiOrio contributed $23,452 and then retired in July 1990 at the age of 50 with an expected benefit in excess of $500,000. Edward McElroy contributed $34,385.50 and then retired in November 1992 at age 51 with an expected benefit of approximately $550,000.

under 42 U.S.C. § 1983, they were entitled to declaratory relief, an injunction, restoration of any benefits wrongly withheld, and attorney's fees.

The district court denied the defendants' motion to dismiss. *See National Educ. Ass'n—R.I.* v. *Retirement Bd.*, 890 F. Supp. 1143, 1165 (D.R.I. 1995) ("*NEA I*"). Following discovery and cross motions for summary judgment, the district court decided the heart of the case in a detailed and lucid opinion on August 7, 1997. *See National Educ. Ass'n—R.I.* v. *Retirement Bd. of R.I. Employees' Retirement Sys.*, 972 F. Supp. 100 (D.R.I. 1997) ("*NEA II*"). The decision resolved all legal issues but reserved for later disposition a few factual questions as to the status of three individual plaintiffs.

In a nutshell, the district court ruled that the Takings Clause protected the benefits of two groups of plaintiffs: those who were eligible to retire and had retired by the date of the Eviction Act (July 15, 1994), and those who were eligible to retire but were still working as of that date.[4] Three other plaintiffs who were still working and were not eligible for retirement at the date of the Eviction Act were held not protected by the Takings Clause or by the Contract Clause or by substantive due process concepts. *See id.* at 114-15.

Given these legal rulings, the parties then stipulated as to the status of two of the other remaining plaintiffs—one was eligible to retire and therefore protected and the other was not—leaving only one plaintiff (DeOrsey) whose status was contested. In April 1998, the district

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[4] *See NEA II*, 972 F. Supp. at 115-16. Eligibility was primarily equated with the 28-years-of-employment or age-60-and-10-years-of-employment requirement of the retirement plan; a few of the retired plaintiffs were included as eligible, even though they had retired early, because state law so permitted. *Id.* at 113-14.

court conducted a bench trial and ruled that DeOrsey had never been eligible to join the retirement system. Thereafter, the district court entered a final judgment in favor of the eligible plaintiffs and against the ineligible ones. The defendants now appeal from the first part of the judgment, and the ineligible plaintiffs, together with DeOrsey, from the second.

On appeal, our review is *de novo* as to the legal issues resolved on summary judgment, *see Terry* v. *Bayer Corp.*, 145 F.3d 28, 34 (1st Cir. 1998), and for clear error as to the factual issues resolved at DeOrsey's bench trial. *See Williams* v. *Poulas*, 11 F.3d 271, 278 (1st Cir. 1993). We begin with the plaintiffs' Contract Clause claims, if only because most of the precedent addresses such cases under this rubric. The claims raise a difficult set of issues that were expressly reserved in this court's leading decision in *McGrath* v. *Rhode Island Retirement Board*, 88 F.3d 12 (1st Cir. 1996), further complicated by the somewhat eccentric facts of this case.

Pension plans come in all sorts of shapes and sizes but the typical plan contemplates a stream of payments to be received by the employee starting upon retirement; both the terms and the payment formula are normally stated in the plan. In defined benefit plans, such as that of Rhode Island, the employee may be required to contribute during employment; but much of the payout is contributed by the employer, often funded in advance at least in part. *See generally* 1 J. Mamorsky, *Employee Benefits Law: ERISA and Beyond* §§ 1.01-1.05, at 1-2 to 1-25 (1998).

Although such plans may be negotiated as explicit contracts (*e.g.*, as part of a collective bargaining agreement), quite often they are simply "plans." The plans may or may not have language binding the employer not

to change them (at least in certain circumstances) or reserving its right to do so (at least in certain circumstances). Often, such plans have "vesting" provisions,[5] but strictly speaking such provisions usually describe how the existing plan operates and not whether the plan itself can be altered unilaterally by the employer. "Vesting" and "contractual" are not synonymous.

In *McGrath*, this court surveyed the case law and concluded that with respect to *private* pension plans, the courts were divided, but that a substantial body of case law treats such plans as implied contracts, protecting at least those whose rights have "vested." *McGrath*, 88 F.3d at 16-17. The theory is that the plan is an offer and the employee, by working for many years pursuant to the plan, has relied on and accepted the offer, which cannot now be changed unilaterally as to a vested employee, whether still working or retired. *Id.* at 17. Of course, the plan may still explicitly reserve rights to alter vested benefits.[6]

The case law concerning *public*-employee pensions is less settled. Some courts, including this one, have been quite hesitant to infer a contract where the state pension statute neither speaks in the language of contract nor explicitly

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[5] Typically, the pension "vests" after the employee has worked for a specific period (in Rhode Island the period is 10 years, *see* R.I. Gen. Laws. § 36-10-11), and then the employee receives a pension—at the retirement age—even if he leaves state employment and works elsewhere until retirement. However, an employee who leaves immediately after vesting but before retirement will likely get a lower pension than an employee who works for the state until retirement. *See* R.I. Gen. Laws § 36-10-10.

[6] *See McGrath*, 88 F.3d at 14, 20 (noting statutory language reserving right to amend plan); *City of Charleston* v. *Public Serv. Comm'n*, 57 F.3d 385, 393-95 (4th Cir.), *cert. denied*, 516 U.S. 974 (1995) (same); *National Ass'n of Gov't Employees* v. *Commonwealth*, 646 N.E.2d 106, 110 (Mass.), *cert. denied*, 515 U.S. 1161 (1995) (same).

precludes amendment of the plan. *See, e.g., Parker*, 123 F.3d at 5-6. After all, legislatures regularly modify compensation schedules and benefit programs. Supreme Court precedent has tended to treat government pension statutes as similarly subject to modification for payments not yet made, unless the government's intent to create a contract is clear and definite. *See, e.g., Dodge* v. *Board of Educ.*, 302 U.S. 74, 78-79 (1937).

Thus,

> absent some clear indication that the legislature intends to bind itself contractually, the presumption is that 'a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.' *Dodge* v. *Board of Educ.*, 302 U.S. 74, 79 (1937). . . . [T]he principal function of a legislature is not to make contracts, but to make laws that establish the policy of the state. . . . Policies, unlike contracts, are inherently subject to revision and repeal, and to construe laws as contracts when the obligation is not *clearly and unequivocally expressed* would be to limit drastically the essential powers of a legislative body.

National R.R. Passenger Corp. v. *Atchinson, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 465-66 (1985) (emphasis added).

Although *National Railroad* involved a claim that federal statute created contractual rights,[7] the *Dodge* case cited by the Court with approval in *National Railroad*

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[7] Strictly speaking, the Contract Clause does not govern acts of the United States, *see United States* v. *Winstar Corp.*, 518 U.S. 839, 876 (1996), but similar principles have been said to apply to the federal government, and *National Railroad* itself addresses Contract Clause-based arguments on their own terms with regard to the federal statute, *National Railroad*, 470 U.S. at 469-70.

involved a state pension statute for teachers; and in *Dodge* the Court explicitly held that a reduction in pensions for already retired teachers did not violate the Contract Clause. *See Dodge*, 302 U.S. at 81. More recently, the Supreme Court allowed a statutory reduction in railroad worker pensions for some "vested" workers, noting that "railroad benefits, like social security benefits, are not contractual and may be altered . . . ." *United States R.R. Retirement Bd.* v. *Fritz*, 449 U.S. 166, 173 (1980) (citations omitted).

The clear statement requirement for "legislative" contracts has been regularly imposed by the Supreme Court and followed by this court.[8] The policy reasons for protecting legislative power against implied surrender are too obvious to warrant much elaboration, *see National Railroad*, 470 U.S. at 466; *McGrath*, 88 F.3d at 19, and it is easy enough for a statute explicitly to authorize a contract or to say explicitly that the benefits are contractual promises,[9] or that any changes will not apply to a specific class of beneficiaries (*e.g.*, those who have retired), *cf. Parker*, 123 F.3d at 8-9.

We do not think that the Rhode Island general pension statute "clearly and unequivocally" *contracts* for future benefits either by language or—in the circumstances of this

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[8] *See National Railroad*, 470 U.S. at 465-66; *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 17-18 & n.14 (1977); *Dodge*, 302 U.S. at 78-79; *Rhode Island Laborers' Dist. Council* v. *Rhode Island*, 145 F.3d 42, 44 (1st Cir. 1998); *cf. Parker* v. *Wakelin*, 123 F.3d 1, 5-6 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 1675 (1998); *McGrath*, 88 F.3d at 19; *Hoffman* v. *City of Warwick*, 909 F.2d 608, 614 (1st Cir. 1990).

[9] *See Indiana ex rel. Anderson* v. *Brand*, 303 U.S. 95, 105 (1938) (holding act "couched in terms of contract" and using contractual language gave rise to Contract Clause claim under teacher employment statute); *United States Trust*, 431 U.S. at 18. ("The intent to make a contract is clear from the statutory language.").

case—through the nature of the relationship. Nowhere does the statute call the pension plan a "contract" or contain an anti-retroactivity clause as to future changes. *Compare Brand*, 303 U.S. at 105. The closest that the statute comes is a provision headed "Guaranty by state—Annual appropriations" which provides, *inter alia*, that

> it is the intention of the state to make payment of the annuities, benefits, and retirement allowances provided for under the provisions of this chapter and . . . to make the appropriations required by the state to meet its obligations to the extent provided in this chapter. The general assembly shall make annual appropriations which shall be sufficient to provide for the payment of annuities, benefits, and retirement allowances required of the state under this chapter.

R.I. Gen. Laws § 36-10-7. This certainly directs state officials to fund the plan as it exists. But it falls at least a step short of clearly expressing a contractual commitment not to change benefit levels or other plan variables by legislation. *Compare Parker*, 123 F.3d at 8-9.

Nor we do think that references in the statute to "vesting" create a contract. Often, and clearly so in Rhode Island's statute, "vesting" refers to the period provided by a plan for which an employee must work to become eligible for a pension if and when he attains retirement age. *See* note 5, above. Whether a plan affords contractual protections against a change in its terms is a different question. A plan may not protect "vested" employees against change, *see Fritz*, 449 U.S. at 169 n.3, 173-74, or alternatively may provide some contractual protection even for unvested employees (*e.g.*, against a change in the vesting period), *cf. State of Nevada Employees Ass'n, Inc.* v. *Keating*, 903 F.2d 1223, 1226-27 (9th Cir. 1990).

If one turns from language to circumstances, *see United States Trust*, 431 U.S. at 17 n.14, it is true that *today* private pensions are often conceived and crafted more as deferred compensation than as gifts. *See Parker*, 123 F.3d at 6-8; *McGrath*, 88 F.3d at 16-19. But pensions can still be created (and withdrawn) without contract; this was just what the Supreme Court found as to railroad retirement benefits in *Fritz* itself. *See Fritz*, 449 U.S. at 174; *see also Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 575 (1979). Further, Rhode Island's general pension plan was created in 1936 when the view of pensions taken in *Dodge* was quite widespread.

Rhode Island case law points in both directions. The state supreme court has implied that under state law pensions cannot be freely terminated; but it has also allowed cut-offs (of, for example, a faithless judge) not easily reconciled with a strict contract theory. *See In re Almeida*, 611 A.2d 1375 (R.I. 1992). In all events, whether a contract exists for Contract Clause purposes is a federal question. *See General Motors Corp.* v. *Romein*, 503 U.S. 181, 187 (1992).

The existence of an employer-employee relationship does weigh in favor of finding an implied contract, as the non-governmental pension cases make clear. *See McGrath*, 88 F.3d at 17 (summarizing case law). However, the force of this consideration is very much muted in this case: these particular plaintiffs do not have the benefit of a clear and longstanding employer-employee relationship *with the government*—they are far from the quintessential 10 or 28-years-of-service government employees.

We decline to decide now whether this last consideration would tip the balance if, for example, Rhode Island took a meat axe to the pensions of long-time state employees. In many states, there are express limitations on such

changes; and in general, political constraints make them unlikely (but not impossible).[10] In all events, the clear statement rule is binding unless and until altered by the Supreme Court, *see State Oil Co.* v. *Khan*, 118 S. Ct. 275, 284 (1997); and the conundrum of a "statutory" contract that may meet this requirement by clear implication rather than clear language is an issue happily deferred.

We turn now to the basis given by the district court for granting relief, namely, that the future payments constituted a property right that could not be infringed without payment of compensation to retirees or employees eligible to retire. In *McGrath*, we explicitly reserved decision on this issue, *see McGrath*, 88 F.3d at 20 n.9, finding that the pension expectancies at issue had not even vested at the time that they were modified by the legislature. Here, the issue can no longer be fully postponed.

The Fifth Amendment forbids the federal government from taking "property" for public use without just compensation, and this limitation has been extended to the states through the Fourteenth Amendment. *See Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 160 (1980). What constitutes "property" for this purpose is a recurring issue to which no mechanical answer has been found. The concept includes more than tangible property owned outright, *see United States* v. *Willow River Power Co.*, 324 U.S. 499, 502-03 (1945), and has been extended to materialmen's liens, *see Armstrong* v. *United*

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[10] A number of states have explicit constitutional protections against "retroactive" changes in pension benefits; and in at least one other protects such benefits by statute. *See* D. Simko, "Of Public Pensions, State Constitutional Contract Protection, and Fiscal Constraint," 69 Temple L. Rev. 1059, 1060 & n.13 (1996). *Compare Winstar*, 518 U.S. at 878-83 (suggesting some limits on application of "unmistakability" doctrine to *express* government contracts) (plurality opinion of Souter, J.).

States, 364 U.S. 40, 44 (1960), and trade secrets protected under state law, *see Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1003-04 (1984).

But the Supreme Court has also made clear that protection under the Takings Clause does not extend to mere "unilateral expectation[s]," even if they are entirely plausible expectations of economic benefit. *Webb's Fabulous Pharmacies*, 449 U.S. at 161; *cf. Eastern Enterprises* v. *Apfel*, 118 S. Ct. 2131, 2161-63 (1998) (Breyer, J., dissenting). Thus, the Supreme Court has excluded from the "property" rubric riparian rights recognized under state law, railroad pensions, and future social service benefits. *Willow River*, 324 U.S. at 502-03 (riparian rights); *Hisquierdo*, 439 U.S. at 575 (railroad pensions); *Flemming* v. *Nestor*, 363 U.S. 603, 608-611 (1960) (social security). This is so even though expectations are sometimes afforded procedural protection, *see, e.g., Goldberg* v. *Kelly*, 397 U.S. 254 (1970), and protection from wholly arbitrary action, *see Fritz*, 449 U.S. at 172. *See* R. Rotunda & J. Nowak, 2 *Constitutional Law: Substance and Procedure* § 15.12, at 485 n.4, § 17.5, at 626 (2d ed. 1992).[11]

In the present case, the Takings Clause does, or arguably does, to some extent protect *some* interests of plaintiffs under the pension plan. Pension payments actually made to retirees become their property and are protected

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[11] A further confusion arises because the phrase "investment-backed expectations" is sometimes used in the cases in quite a different way: to decide—*after* a property right is found to exist (*e.g.*, land ownership)—whether a particular invasion by the government—*e.g.*, an infringement on air rights—constitutes a compensable taking of something one reasonably invested in when making the purchase. *See Penn Central Transp. Co.* v. *City of New York*, 438 U.S. 104, 124-25 (1978); *see also Kaiser Aetna* v. *United States*, 444 U.S. 164, 175 (1979).

against takings, even if and where the payments are unquestionably a gift. Similarly, anything that the employee contributed, directly or by purchase of benefits, may well be regarded as the employee's property. Under the Rhode Island plan, contributions are returned with interest even to a non-vested employee who leaves the state's employment. *See* R.I. Gen. Laws § 36-10-8. However, the Eviction Act did not purport to reclaim any benefits actually paid, and it provided for the return of any member contributions, with interest, to the extent that they exceeded already paid-out benefits. *See* R.I. Gen. Laws §§ 36-9.1-2(a), (b).

Thus, the question for us is whether, apart from what has been paid in by the member or already paid out by the state, the prospective payments of the state's share of the defined benefits are currently "property" of the plaintiffs under the Takings Clause. If there were a contractual right to such payment, that right itself would be property for the purposes of the Takings Clause. *See United States Trust,* 431 U.S. at 11 n.16. But in this case we have already said that the state's prospective payments, over and above the members' contributions, are not contractually obligated under the Contract Clause —at least as to "last minute" entrants such as the plaintiffs.

In Hoffman, we concluded that "[n]oncontractual employee benefits that a recipient has not yet received, but has a mere expectation of receiving, are not property as to which the government, before repealing, must provide just compensation." *Hoffman,* 909 F.2d at 616. There we denied a Contract Clause claim because a pension statute did not clearly indicate an intent to bind the legislature contractually, *see id.* at 614, and then denied a Takings Clause claim because there was no enforceable contract right, *see id.* at 616; *cf. Fritz,* 449 U.S. at 174. That decision is controlling here.

This position is virtually compelled by Supreme Court cases that, after finding that an expected statutory benefit did not constitute a contract right, rejected the claim to payment. *See, e.g., National Railroad,* 470 U.S. at 466-67, 478-79; *Flemming,* 363 U.S. at 610-11; *Dodge,* 302 U.S. at 78-81. It would make nonsense of such rulings—and the clear intent requirement—to conclude that an expectancy insufficient to constitute an enforceable contract against the state could simply be renamed "property" and enforced as a promise through the back door under the Takings Clause.

This brings us to the final constitutional attack on the Eviction Act: the claim that it violates "substantive" due process. An expectation that is not "property" for purposes of the Takings Clause may yet sometimes entitle the citizen to procedural protection, and substantive protection against arbitrariness, before the expectation is cut off by government action. *See Flemming,* 363 U.S. at 610-11; *Hoffman,* 909 F.2d at 618. The plaintiffs' claim here is to substantive protection (no procedural rights have been denied), but the due process standard in economic matters is one of minimum rationality. *See Usery* v. *Turner Elkhorn Mining Co.,* 428 U.S. 1, 17 (1976); *Hoffman,* 909 F.2d at 618.

When Congress curtailed pension rights of certain vested railroad employees to prevent windfall benefits, it made fairly mechanical judgments about who should be grandfathered into double pensions and who should not, and the Supreme Court upheld those judgments. *See Fritz,* 449 U.S. at 174, 179-80. Similarly, we only recently upheld against such an attack certain distinctions made by Congress in social security payments to limit duplicative recovery, even while recognizing that the restrictions involved some fairly gross distinctions that could

hardly be described as perfect justice. *See Splude* v. *Apfel*, 165 F.3d 85, 92 (1st Cir. 1999).

Here, the class of persons who have been "evicted" are individuals who were never public employees—at least in the capacity for which the state pensions are sought—and were permitted to enter the system at bargain-basement prices while retaining their pensions as union employees. The discrepancies between what they contributed as a class and what they might expect in pensions was striking. And almost at once, they were warned of legislative efforts to undo their usual benefits. The first such attempt (the Repeal Act) was frustrated in state court, but the Eviction Act followed hard on its heels.

At argument, plaintiffs' counsel pointed out that the legislature has in the past given special pension benefits to favored groups, allowing (for example) veterans to "purchase" years of credit. *Cf. McGrath*, 88 F.3d at 13 (describing R.I. Gen. Laws §§ 45-21-9, 45-21-53). But especially in economic regulation, the question is not whether the legislature has dealt perfectly with all possible problems but whether its choice in this instance was rational. *See Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 730 (1984); *Fritz*, 449 U.S. at 176-77; *Hoffman*, 909 F.2d at 618. Here, the choice to evict this group of members, returning to them their contributions with interest, is not so patently arbitrary, irrational, or unrelated to a legitimate legislative purpose as to constitute a violation of substantive due process.

Our resolution makes it unnecessary to discuss whether the additional plaintiffs, to whom the district court denied relief, were "eligible" or bona fide members of the plan. It reserves, once again, the very difficult case of the long-time vested or eligible employee whose benefits might be curtailed. And it leaves it open to Rhode Island and its

employees to address such matters by explicit legislation or ordinary contract, the course best suited to achieve certainty on both sides.

The decision of the district court is *vacated* and the matter is *remanded* for entry of a judgment dismissing the complaint.

It is so ordered.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

C.A. No. 94-0389L

NATIONAL EDUCATION ASSOCIATION-RHODE ISLAND, *et al.*,
Plaintiffs,

v.

RETIREMENT BOARD OF THE RHODE ISLAND EMPLOYEES' RETIREMENT SYSTEM, *et al.*,
Defendants.

JUDGMENT

The Court having entered a Decision and Order dated August 7, 1997 on the parties' cross motions for summary judgment that: (1) granted defendants' motion and denied plaintiffs' motion with respect to plaintiffs John V. Callaci, Diana Casey, Denise Felice, Karen Comiskey Jenkins, Charlene Lee, Cornelius McAuliffe, Janice Lanik Quinn, Vincent Santaniello, Joan Silva, Diane Thurber, and Jeannette Wooley; (2) granted plaintiffs' motion and denied defendants' motion with respect to plaintiffs Edward Casey, Robert Casey, Bernard Connerton, Joseph Grande, Robert Joy, Edward McElroy, Harvey Press, and Bernard Singleton; and (3) determined that genuine issues of material fact existed with respect to the claims of plaintiffs Richard DeOrsey, Ronald DiOrio, and Gloria Heisler; and

The parties having submitted, and the Court having entered, stipulations obviating the need to resolve disputed factual issues with respect to the claims of plaintiffs Ronald DiOrio and Gloria Heisler; and

The Court having conducted a bench trial on April 28 and 29, 1998 with respect to the claims of plaintiff Richard DeOrsey, and having rendered a decision with respect to these claims:

Now, therefore, it is hereby ORDERED and ADJUDGED that:

1. R.I.G.L. § 36-9.1-1 *et seq.* (hereinafter the "Eviction Act") is hereby declared and adjudged constitutional as applied to plaintiffs John V. Callaci, Diana Casey, Denise Felice, Karen Comiskey Jenkins, Charlene Lee, Cornelius McAuliffe, Janice Lanik Quinn, Vincent Santaniello, Joan Silva, Diane Thurber, and Jeannette Wooley, and each claim asserted by these plaintiffs is hereby dismissed in its entirety and with prejudice.

2. Within ninety (90) days of the date of this Judgment, or the termination of any stay entered in accordance with paragraph 3, the defendant Retirement Board of the Rhode Island Employees' Retirement System (hereinafter the "Retirement Board") shall return to each of the individual plaintiffs referenced in paragraph 1, in accordance with the provisions of the Eviction Act, any contributions or purchases made by such plaintiff, or by his or her employer for the benefit of such plaintiff, pursuant to R.I.G.L. § 36-9-33 (repealed), with interest at the actuarially assumed rate of return of the Retirement System on its pension funds as of the date of this Judgment (8%, compounded annually). Upon the written request of any such plaintiff, the Retirement Board shall effectuate such return of purchases and contributions by rolling them over to an individual retirement account, individual

retirement annuity, or other qualified retirement plan in accordance with instructions provided on a properly executed direct rollover authorization form provided by the Retirement Board.

3. As to any of the plaintiffs referenced in paragraph 1 who file a timely notice of appeal, the return of purchases and contributions under paragraph 2 shall be stayed pending the final resolution of such appeal.

4. The Eviction Act is hereby declared and adjudged unconstitutional as applied to plaintiffs Edward Casey, Robert Casey, Bernard Connerton, Joseph Grande, Gloria Heisler, Robert Joy, Edward McElroy, Harvey Press, and Bernard Singleton on the ground that it violates the Takings Clause of the United States Constitution as applicable through the Fourteenth Amendment, U.S.Const.Amend V, XIV.

5. Within ninety (90) days of the date of this Judgment, or the termination of any stay entered in accordance with paragraph 6:

a. The plaintiffs referenced in paragraph 4 shall be reinstated in the Rhode Island Employees' Retirement System (hereinafter the "Retirement System") with all the rights, benefits, and obligations that they would have had if the Eviction Act had not been enacted; and the plaintiffs National Education Association-Rhode Island and Rhode Island Federation of Teachers shall have all the rights, benefits, and obligations under R.I.G.L. § 36-9-33 with respect to these plaintiffs that these organizations would have had if the Eviction Act had not been enacted.

b. Each of the plaintiffs referenced in paragraph 4 who had not retired as of the effective date of the

Eviction Act shall pay to the Retirement System all previously unpaid employee contributions that would have been required under R.I.G.L. § 36-9-33 had the Eviction Act not been enacted; and the plaintiffs National Education Association-Rhode Island and Rhode Island Federation of Teachers shall pay to the Retirement System all previously unpaid employer contributions that would have been required with respect to such plaintiffs under R.I.G.L. § 36-9-33 had the Eviction Act not been enacted. In each case, such payments shall be made with "regular interest" at the rate of 5% compounded annually.

c. The Retirement Board shall pay to each of the plaintiffs referenced in paragraph 4 who has retired as of the date of this Judgment, or who shall have retired as of the termination of any stay entered pursuant to paragraph 6, with interest at the rate referenced in paragraph 2, all previously unpaid pension benefits that would have been payable to the plaintiffs under R.I.G.L. § 36-9-33 if the Eviction Act had not been enacted.

6. If the defendants file a timely notice of appeal with respect to any of the plaintiffs referenced in paragraph 4, the provisions of paragraph 5 shall be stayed with respect to each such plaintiff pending the final resolution of such appeal.

7. In accordance with the stipulation between the parties dated February 11, 1998 and entered by the Court on February 13, 1998, judgment shall enter for the defendants as to all claims of plaintiff Ronald DiOrio, and such claims are hereby dismissed with prejudice.

8. In accordance with the stipulation between the parties dated April 23, 1998 and entered by the Court on May 14, 1998, the Retirement Board shall credit plaintiff

Gloria Heisler, for the purposes of paragraphs 5(a) and (c), with 7.5 years of credit pursuant to R.I.G.L. § 36-9-33 instead of the 14 years and 9 months purchased; and for purposes of paragraph 5(c), interest shall not be paid to Gloria Heisler for any time period through and including the date of this Judgment.

9. In accordance with the Court's findings of fact and conclusions of law entered on April 29, 1998, judgment shall enter for the defendants as to all claims of plaintiff Richard DeOrsey, and such claims are hereby dismissed with prejudice.

So ordered,

Dated: 6/2/98 /s/ Ronald R. Lagueux
CHIEF JUDGE RONALD R. LAGUEUX
United States District Court

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

C. A. No. 94-0389L

NATIONAL EDUCATION ASSOCIATION—RHODE ISLAND, by it Secretary, Tia Scigulinsky, RHODE ISLAND FEDERATION OF TEACHERS, by its Secretary, Coleen Bielecki, JOHN CALLACI, DIANA CASEY, EDWARD CASEY, JR., ROBERT CASEY, BERNARD CONNERTON, RICHARD DEORSEY, RONALD DIORIO, DENISE FELICE, JOSEPH GRANDE, GLORIA HEISLER, KAREN COMISKEY JENKINS, ROBERT JOY, JANICE LANIK, CHARLENE LEE, CORNELIUS MCAULIFFE, EDWARD MCELROY, HARVEY PRESS, VINCENT SANTANIELLO, JOAN SILVA, BERNARD SINGLETON, DIANE THURBER, AND JEANETTE WOOLEY,
Plaintiffs,

v.

RETIREMENT BOARD OF THE RHODE ISLAND EMPLOYEES' RETIREMENT SYSTEM, NANCY MEYER, Chairperson and Treasurer of the Retirement Board of the Rhode Island Employees' Retirement System in her official capacity, and JOANN FLAMINIO, Executive Director of the Retirement Board of the Rhode Island Employees' Retirement System in her official capacity,
Defendants.

DECISION AND ORDER

RONALD R. LAGUEUX, Chief Judge.

In the present case, plaintiffs challenge the constitutionality of R.I. Gen. Laws §§ 36-9.1-1 to -2 (hereinafter

the "Eviction Act"). Plaintiffs, employees and organizations that represent employees of the state "for the purposes of collective bargaining," were permitted to elect coverage by the Rhode Island Employees' Retirement System (the "Retirement System") pursuant to R.I. Gen. Laws § 36-9-33 in 1987. Despite the subsequent repeal of that provision, a judge of the Rhode Island Superior Court upheld plaintiffs' admission into the Retirement System. In 1994, however, the Rhode Island General Assembly (the "General Assembly") passed the Eviction Act, under which plaintiffs' participation in the Retirement System was terminated. Plaintiffs now assert that the Eviction Act, as applied, violates the Contract Clause, the Takings Clause, and the Due Process Clause of the United States Constitution.

The matter is presently before the Court on the parties' cross-motions for summary judgment pursuant to Rule 56(c) of the Federal Rules of Civil Procedure.[1] For the reasons that follow, plaintiffs' motion for summary judgment is granted in part and denied in part. Defendants' motion for summary judgment is granted in part and denied in part.

I. Facts

In *Nat'l Educ. Ass'n—Rhode Island v. Retirement Bd. of the Rhode Island Employees' Retirement Sys.* ("NEA-I"), 890 F. Supp. 1143 (D.R.I. 1995), an opinion denying defendants' motions to dismiss, this Court set forth the background of the present controversy. The following statement recounts those facts, with the addition of all

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[1] Plaintiff-intervenor Richard DeOrsey filed his own motion for summary judgment. Since the arguments presented in DeOrsey's memorandum of law parallel the arguments set forth by the other plaintiffs in their collective motion, this Court will refer to plaintiffs' motions for summary judgment as one motion.

further factual development. The facts are undisputed, except as noted.

In 1936, the General Assembly established the Retirement System. 1936 R.I. Pub. Laws ch. 2334; R.I. Gen. Laws § 36-8-2. State employees, public school teachers, and employees of participating municipalities who otherwise meet the eligibility requirements are able to participate in the Retirement System. *See* R.I. Gen. Laws § 36-9-2 (state employees); § 16-6-2 (public school teachers); § 45-21-8 (municipal employees). Provisions governing the Retirement System are currently codified in title 36, chapters 8-10 of the General Laws of Rhode Island.

Defendant Retirement Board of the Rhode Island Employees' Retirement System (the "Retirement Board") bears responsibility for the general administration and operation of the Retirement System. *See* R.I. Gen. Laws § 36-8-3. Defendant Nancy J. Mayer, in her capacity as the General Treasurer of Rhode Island, serves as the ex-officio chair of the Retirement Board and as custodian of the funds and treasurer of the Retirement System. *See* R.I. Gen. Laws § 36-8-9.

The Retirement System is a "defined benefit" plan.[2] Therefore, benefits paid to a participating employee are

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[2] This differs from a "defined contribution" plan under which the benefits payable to each employee are based directly on the contributions made by or on behalf of that employee, combined with associated investment income. *See Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 229-230 (1986) (O'Connor, J., concurring). Under a "defined contribution" plan, benefits paid to an individual are fully funded by the combination of employer and employee contributions. *Id.* By contrast, under a "defined benefit" plan, the contributions paid on behalf of an individual may not fully fund the projected costs of the benefits paid to that particular employee, although the combination of employee contributions and annual state appropriations is calculated to fully fund the Retirement System on an aggregate basis.

calculated as a percentage, determined by the number of years of credited service, of the average of his or her three highest consecutive years of compensation, multiplied by his or her years of service. *See* R.I. Gen. Laws § 36-10-10. Employees participating in the Retirement System must contribute a fixed percentage to the Retirement System. R.I. Gen. Laws § 36-10-1.

Pursuant to R.I. Gen. Laws § 36-10-9, participating employees may retire and begin receiving benefits after (a) reaching the age of sixty and completing ten years of service, or (b) completing twenty-eight years of service. Section 36-10-7 of Rhode Island General Laws provides that "it is the intention of the state" to make the required payments in accordance with these provisions.

On July 3, 1987, after repeated attempts to pass similar bills, the General Assembly enacted R.I. Gen Laws § 36-9-33, which authorized certain private-sector employees to participate in the Retirement System. In accordance with § 36-9-33(a), "full-time employees or organizations representing employees of the state and/or any political subdivision thereof for the purposes of collective bargaining" were admitted to the Retirement System, provided that coverage was properly elected. In addition, pursuant to R.I. Gen. Laws § 36-9-33(b), such employees were permitted to purchase credit for past years of service as full-time union employees.[3]

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[3] R.I. Gen. Laws § 36-9-33 provided:

> (a) The provisions of chapters 8 through 10 of this title, inclusive, [which establish the terms of the Retirement System,] shall apply to full-time employees or organizations representing employees of the state and/or any political subdivision thereof for the purposes of collective bargaining; provided, that any such organization must elect to be covered by the provisions of chapters 8 through 10 of this title by forwarding a certified vote of the organization's appropriate authority to the retire-

Pursuant to § 36-9-33(a), plaintiffs National Education Association—Rhode Island ("NEA-RI") and Rhode Island Federation of Teachers ("RIFT") elected coverage by the Retirement System. In addition, certain union employees, currently the individual plaintiffs in the present action, filed applications with the Retirement Board.

On June 6, 1988, however, the General Assembly repealed § 36-9-33. *See* 1988 Pub. Laws ch. 486 ("Repeal Statute"). At that time, the applications of the individual plaintiffs were pending before the Retirement Board. Based on the repeal of § 36-9-33, the Retirement Board deemed plaintiffs ineligible to participate in the Retirement System, and, therefore, the individual plaintiffs were not allowed to accrue future service credits in the Retirement System or to purchase additional service credits.

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ment board not later than December 31, 1988; and provided further, that participation shall not begin later than July 1, 1989. The organization's contribution shall be at the same rate as the contribution of a local education agency for certified teachers. All employees in service as of the date of said certified vote shall become members unless they notify the retirement board, in writing, within sixty (60) days from the date of said certified vote, that they do not wish to become members.

(b) Any member of the state employees retirement system or any full-time employee of an organization representing employees of the state and/or any political subdivision thereof for the purposes of collective bargaining, who has prior hereto been a full-time employee of such an organization or who has been employed by any public school district in-state or out-of-state, may purchase credit for such employment. The cost to purchase said credits shall be ten percent (10%) of the employee's first year's earnings as a full time employee of such an organization multiplied by the number of years, and any fraction thereof, of such employment. Provided further, that any such employee who was on official leave of absence from such organization shall be eligible to purchase credits as hereinbefore provided for the period of such leave of absence.

On October 20, 1988, NEA-RI, RIFT, and other organizational and individual plaintiffs filed a suit against the Retirement System and the Executive Director of the Retirement Board in Rhode Island Superior Court, claiming that they were entitled to join the Retirement System since they had filed their applications for admission while § 36-9-33 was still in effect. On December 11, 1986, a judge of the Rhode Island Superior Court agreed that the repeal of § 36-9-33 was merely prospective in nature. In addition, on April 23, 1990, the same Superior Court judge, responding to a Petition for Clarification and/or Instructions, held that the individual plaintiffs "shall be treated as becoming members of the Retirement System as of . . . January 1, 1990." Neither decision was appealed, and, therefore, the Superior Court judgments became final.

Pursuant to those judgments, the individual plaintiffs were admitted as members of the Retirement System on January 1, 1990. On that date, NEA-RI and RIFT and its affiliates became employers in the Retirement System and were required to contribute to the Retirement System in accordance with § 36-9-33(a). In addition, the individual plaintiffs either began or continued to contribute to the Retirement System and/or purchased past service credits in the Retirement System pursuant to § 36-9-33.[4]

On June 16, 1991, the General Assembly passed an amendment to the Retirement System providing that "no member shall be eligible for pension benefits . . . unless the member shall have been a contributing member of the employee's retirement system for at least ten (10) years." However, the 1991 amendment had a "grandfather" clause, providing that a person who had ten years of

[4] Some of the individual plaintiffs were state employees who had been contributing to the Retirement System already.

service credit as of that date "shall be vested." *See* § 36-10-9(c) (1991).

On July 15, 1994, the General Assembly enacted two identical bills, each entitled "An Act Relating to Public Officers and Employees—Evicting Non-Employee and Non-Teacher Members from the Retirement System," codified as R.I. Gen. Laws §§ 36-9.1-1 to -2 (the "Eviction Act").[5] The Eviction Act provides, in pertinent part:

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[5] The Eviction Act provides:

36-9.1-1. Findings

The General Assembly hereby finds the following: The grant of the opportunity to an individual to purchase, pursuant to Chapter 613 of The Public Laws of 1987, as codified in § 36-9-33 (repealed by PL 88-486), (hereinafter "§ 36-9-33, repealed"), credit in, and/or to become a member of the Retirement Systems established under chapter 16 of Title 16, chapter 21 of title 45, and/or chapters 8-10, inclusive of this title ("Retirement Systems") bears no rational relationship to any legitimate governmental purpose. The continued accrual of benefits by the beneficiaries of § 36-9-33 (repealed) and the continued payment of monies under § 36-9-33 (repealed) will cause an invasion of the corpus of the Retirement Systems funds in abrogation of those sections of the Internal Revenue Code of 1986 as amended from time to time which apply to governmental plans (including but not limited to 401(a) and 401(f)), and does not further the purposes behind the Retirement Systems.

36-9.1-2. Status of non-employee and non-teacher members.

(a) Any individual who became a member of the Retirement Systems based solely on § 36-9-33 (repealed), or who purchased credit in the Retirement Systems based upon § 36-9-33 (repealed), shall no longer be entitled to such membership and/or such credit(s) and shall no longer receive any benefits of any type from said Retirement Systems which was based upon § 36-9-33 (repealed). By January 1, 1995, the Retirement System shall return any contributions or purchases made pursuant to § 36-9-33 (repealed) by said individual and/or said individual's employer, with interest at the actuarially assumed rate earned by the Retirement Systems on its pension funds during

> [a]ny individual who became a member of the Retirement Systems based solely on § 36-9-33 (repealed), or who purchased credit in the Retirement Systems based upon § 36-9-33 (repealed), shall no longer be entitled to such membership and/or such credit(s) and shall no longer receive any benefits of any type from said Retirement Systems which was based upon § 36-9-33 (repealed).

When the Eviction Act was enacted, the status of each individual plaintiff was different with respect to the Retirement System. The participation of the individual plaintiffs in the Retirement System is as follows: [6]

A. *Retirees before July 1994*:

Edward Casey, Jr.:

Edward Casey, Jr. was employed as a field representative and executive secretary for RIFT from March of 1970 to December of 1992. Pursuant to § 36-9-33(b), Casey purchased thirty years and twenty-three days worth of service credit for $28,351.69. He retired in December 1992 at fifty-six years of age.

> the applicable time period since such contributions and/or purchase was made.
>
> (b) Said return of such contributions or purchases shall be offset by any benefits already received by said individual from the retirement system.
>
> (c) Nothing in this chapter shall be construed as prohibiting any individual from later becoming a member of the Retirement Systems or purchasing credits, in accordance with applicable law.

[6] The status of the individual plaintiffs is described as of the time that the motion papers in the present matter were filed. In addition, unless otherwise specified, all purchases described below of service credits in the Retirement System were undertaken pursuant to § 36-9-33.

After his retirement, Casey continued to work for RIFT as a consultant at a rate of one hundred dollars per hour.

Bernard Connerton:

Bernard Connerton worked at NEA-RI from November of 1973 until July 28, 1990. Connerton purchased twenty years, eight months, and twenty-seven days of service credit in the Retirement System for $27,072.88. Pursuant to the early retirement program offered by the state, he retired on July 28, 1990 at the age of fifty-three.

Richard DeOrsey:

From July of 1983 until September of 1995, Richard DeOrsey worked as a consultant/administrator for the Independent Association of Employees ("IAE"). From 1974 through 1983, DeOrsey worked for Council 94, an affiliate of the American Federation of State, County, and Municipal Employees. In accordance with § 36-9-33, he filed an application to the Retirement Board which was still pending at the time the General Assembly passed the Repeal Statute. After the decision of the Rhode Island Superior Court, DeOrsey purchased eighteen years and ten months of credit in the Retirement System for $14,440.50.[7] On October 31, 1992, at the age of sixty, DeOrsey retired.

Defendants acknowledge that DeOrsey purchased credits partially for his service at IAE and partially for his service at Council 94. However, they contend that there is neither evidence that DeOrsey was a full-time employee at IAE during the time for which he purchased the serv-

[7] The calculations of the parties differ as to the amount of service credits purchased by DeOrsey and the purchase price for those credits. However, those differences are of no legal significance for purposes of this opinion.

ice credits, nor evidence that IAE properly elected coverage pursuant to § 36-9-33.

In contrast, DeOrsey maintains that his position as a "consultant/administrator" rendered him a full-time employee at IAE. Moreover, DeOrsey emphasizes that he paid his contribution, as required by § 36-9-33, and IAE made the requisite contribution to the Retirement System on his behalf.

Ronald DiOrio:

Ronald DiOrio served as the president of NEA-RI from 1973 until 1985. From October 1988 to February 1989, DiOrio was allegedly re-employed by NEA-RI. In or about August of 1990, DiOrio purchased eleven years, ten months, and seven days of service credits in the Retirement System based on his years of service as the president of NEA-RI. In addition, DiOrio purchased ten years, one month, and one day of service credits pursuant to R.I. Gen. Laws § 36-10-8 for service he had performed as a public school teacher from 1963 through 1973.

In support of his application to purchase these credits, DiOrio allegedly submitted, or caused to be submitted, a letter from Donald C. Hill, the Executive Director of NEA-RI, stating:

> This is to certify that Ronald L. DiOrio, Social Security #035-26-3041 returned to our payroll at the National Education Association Rhode Island in October 1988 at an annualized rate of pay of $50,000. He took an unpaid leave of absence to start his consulting firm in February 1989. Mr. DiOrio has resigned his leave effective July 27, 1990.

Pursuant to the 1990 early retirement program, DiOrio retired on July 28, 1990, at the age of fifty.

Defendants allege that Ronald DiOrio is currently under indictment by the State of Rhode Island in connection with his participation in, and purchases from, the Retirement System. More specifically, DiOrio has been charged with providing false statements to an agent of the Retirement System with the intent to wrongly induce the Retirement System to provide him with retirement credits and benefits.

Defendants claim that DiOrio was not eligible to purchase service credits pursuant to § 36-9-33 or to retire under the 1990 early retirement program because he was not an employee of NEA-RI at the time that it elected to participate in the Retirement System and only active members of the state retirement system were eligible to avail themselves of such programs. Moreover, defendants emphasize that DiOrio did not attempt to purchase credits pursuant to § 36-9-33 for his past service as the president of NEA-RI prior to the passage of the Repeal Statute in 1988.

In contrast, plaintiffs claim that DiOrio was entitled to purchase credits in the Retirement System for his past service as a state employee because he was a litigant in the successful lawsuit in Rhode Island Superior Court.

Joseph Grande:

Joseph Grande was Executive Secretary of the Providence Teachers Union, an entity affiliated with RIFT, from 1968 through 1993. Grande purchased twenty-two years and ten months of credit in the Retirement System for $33,827.36. He retired on June 16, 1993, at the age of sixty.

Gloria Heisler:

From 1950 through 1965, Gloria Heisler worked as a secretary for the Rhode Island Institute of Instruction,

allegedly a predecessor to NEA-RI. From 1972 to 1990, Heisler was a teacher at South Kingstown Junior High School in Rhode Island. Heisler purchased fourteen years and nine months of service credit for a price of $2241.88. In 1990, at the age of sixty-two, Heisler retired pursuant to the state's early retirement program.

Defendants argue that Heisler's purchase of past service credits was not valid because the organization for which she worked was not an "organization representing employees of the state and/or any political subdivision thereof for the purposes of collective bargaining," as required by § 36-9-33. They contend that public school teachers were not given the right to organize for collective bargaining with their employers until 1966, and, therefore, Heisler's organization could not have had the requisite purpose.

Conversely, plaintiffs maintain that Heisler was in full compliance with § 36-9-33 because the organization for which she was employed is now NEA-RI. In addition, plaintiffs emphasize that teachers were never precluded from collective bargaining, even though there was no statute specifically addressing such activity before 1966.

Edward McElroy:

Edward McElroy served as the president of RIFT from 1972 through 1992. McElroy purchased a total of twenty-eight years in the Retirement System for $34,385.50. On November 1, 1992, McElroy retired at fifty-one years of age. Subsequently, McElroy became the Secretary/Treasurer of the American Federation of Teachers at an annual salary of $120,000.

Bernard Singleton:

Bernard Singleton was employed by NEA-RI from 1968 through 1989, when he left NEA-RI to take the position

of Rhode Island Director of Labor. Singleton purchased a total of twenty-five years, four months, and twenty-eight days of credit in the Retirement System for $25,411.09. He retired on July 28, 1990, at the age of fifty-two, under the 1990 early retirement program.

B. *Retirees after July 1994*:

Janice Lanik:

Janice Lanik worked at NEA-RI from 1987 to 1994 as a UNISERV Director. Before coming to NEA-RI, Lanik worked as a teacher in the North Smithfield school district and participated in the Retirement System from 1971 through 1987. Lanik purchased one years worth of credit in the Retirement System for a cost of $3,478.28. Her date of birth is March 4, 1939.

In February of 1994, Lanik went on disability leave from NEA-RI due to illness. Prior to the passage of the Eviction Act, Lanik applied to retire based upon her disability, but her application was never processed. She resigned on permanent disability in September of 1995 and has not returned to NEA-RI.

At the time the Eviction Act was passed, Lanik was on disability leave, and she had met the years-in-service requirement, but not the age requirement, for retirement. However, the disability retirement Lanik sought did not have a minimum age requirement. Therefore, plaintiffs contend that Lanik might have been deemed eligible to retire, and would have retired prior to the passage of the Eviction Act, had her application been processed.

Cornelius McAuliffe:

Cornelius McAuliffe has worked at a variety of jobs for the State of Rhode Island, NEA-RI, and RIFT. He was

employed by RIFT from March 1968 through December of 1969, and he worked for NEA-RI from August 1971 to August of 1973. He purchased four years and eleven months of credit in the Retirement System for $5,096.67. McAuliffe retired on September 14, 1994, at the age of 60.

C. *Active Employees Eligible to Retire by July 1994*:

Robert Casey:

Robert Casey has been employed as a field representative at RIFT since July of 1974, and he also served as a lobbyist for RIFT from 1975 through 1993 or 1994. Casey purchased twenty-five years of service in the Retirement System for a total of $37,440.67. His date of birth is November 15, 1942.

It is undisputed that Robert Casey had fulfilled both the age and service requirements for retirement by the time the General Assembly passed the Eviction Act.

Robert Joy:

Robert Joy serves as a UNISERV Director at NEA-RI, where he has been employed since 1970. Joy purchased service credits in the Retirement System for thirty years and eight months of past service, at a cost of $33,690.44.

It is uncontested that, at the time the Eviction Act was passed, Robert Joy was eligible for retirement.

Harvey Press:

As of the time the present motions were filed, Harvey Press was the president of NEA-RI, a position he had occupied since 1985. Prior to becoming the president of NEA-RI, Press was a teacher in the North Smithfield school district, where he taught from 1965 to 1985. Dur-

ing that time, Press participated in the Retirement System. Press purchased one year and six months worth of credit in the Retirement System for $6,336.87. His date of birth is March 26, 1943.

It is undisputed that Press was eligible to retire at the time the Eviction Act was passed.

D. *Active Employees Not Eligible for Retirement by July 1994*:

John Callaci:

John Callaci serves as a field representative for RIFT, where he has been employed since October of 1984. Callaci purchased five years and nine months of service credit in the Retirement System for $16,088.97. He was born on November 28, 1956.

At the time the Eviction Act was passed, Callaci did not have the requisite ten years of service for retirement.

Diana Casey:

At the time the present motions were filed, Diana Casey was employed as a staff representative by RIFT, where she has worked since 1979. Casey purchased slightly over fifteen years and twenty days worth of credit in the Retirement System for $12,952.69. Her date of birth is September 28, 1946.

The parties dispute the exact date of Diana Casey's purchase of service credits and whether her purchase occurred prior to June 16, 1991. As stated above, that date marked the end of the period in which purchased service credits were counted when determining eligibility status for retirement. Therefore, the parties disagree as to whether Diana Casey had fulfilled the service requirement for retirement as of the date the Eviction Act was passed.

However, it is undisputed that Diana Casey was not eligible to retire when the Eviction Act was enacted; she was not sixty years old and she did not have twenty-eight years worth of service credit.

Denise Felice:

Denise Felice has been employed with NEA-RI since 1984. In accordance with § 36-9-33, Felice purchased fourteen years, nine months, and seventeen days of service credit in the Retirement System for $16,881.98. Her date of birth is March 11, 1941.

The parties do not dispute that Felice had fulfilled the years-in-service requirement, but not the age requirement, for retirement at the time the Eviction Act was passed.

Karen Comisky Jenkins:

Karen Comisky Jenkins has been employed with NEA-RI as a public relations director since 1979. Jenkins purchased ten years and ten months of credit in the Retirement System for $13,863.66. Jenkins' date of birth is March 6, 1954.

At the time the Eviction Act was passed, Jenkins had fulfilled only the service requirement for retirement.

Charlene Lee:

Charlene Lee has been a full-time employee with RIFT since 1971. Lee purchased nineteen years, five months, and thirteen days in the Retirement System for $9,462.50. Her date of birth is January 12, 1948.

It is undisputed that, at the time the Eviction Act was passed, Lee had neither attained the requisite age nor fulfilled the years-in-service requirement for retirement.

Vincent Santaniello:

Vincent Santaniello is currently employed as the Coordinator of Field Services for NEA-RI, where he has been employed since 1975. For the three and a half years before he joined NEA-RI, Santaniello worked with the Rhode Island Department of Education and participated in the Retirement System. In February of 1988, Santaniello left NEA-RI to become a partner in a law firm, but he returned to NEA-RI in 1989. Santaniello purchased twenty years and six months of credit in the Retirement System at a cost of $38,538.64. His date of birth is July 19, 1945.

It is uncontested that, at the time the Eviction Act was passed, Vincent Santaniello met the service requirement, but not the age requirement, for retirement.

Joan Silva:

Joan Silva is currently employed at NEA-RI as a coordinator of government relations. Silva bought thirteen years, one month, and twenty-four days of credit in the Retirement System at a cost of $7,090.76. Her date of birth is February 2, 1939.

The parties do not contest that, by the passage of the Eviction Act, Joan Silva had service credits in excess of ten years in the Retirement System, but had not yet reached the age of sixty.

Diane Thurber:

Diane Thurber is currently employed as an executive assistant at RIFT, her employer since 1976. Thurber purchased fourteen years of credit in the Retirement System at a cost of $9,707.40. Her date of birth is October 1, 1957.

It is uncontested that Thurber was not eligible to retire when the Eviction Act was passed; she was not yet sixty years of age and she did not have ten years of service credit.

Jeanette Woolley:

Jeanette Woolley is currently employed at NEA-RI as a UNISERV Director and has been employed in that capacity since September of 1991. Woolley purchased seventeen years and ten months of credit in the Retirement System for $10,103.70. Her date of birth is June 29, 1947.

When the Eviction Act was passed, Woolley had not yet fulfilled the age and service requirements to qualify for retirement.

In total, the individual plaintiffs contributed an estimated $1,995,784 to the Retirement System. The present value at retirement of their projected pension benefits is estimated to be $11,430,579, and the average projected rate of return for the individual plaintiffs is approximately 1250%.

After the General Assembly passed the Eviction Act, the above plaintiffs filed suit in this Court claiming that the Act violates three provisions of the United States Constitution.[8] First, plaintiffs allege that the Act impairs their contractual rights in violation of the Contract Clause. U.S. Const. Art. I., § 10. Second, plaintiffs contend that the Eviction Act violates notions of substantive due process, in contravention of the Fourteenth Amendment. U.S.

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[8] Plaintiffs also filed a motion for a preliminary injunction to prevent the state from refunding plaintiffs' contributions to the Retirement System by January 1, 1995, as required by the Eviction Act. Since the Court granted that motion, no refund will issue until this suit is resolved on its merits.

Const. amend. XIV. Finally, plaintiffs claim that the termination of plaintiffs' participation in the Retirement System constitutes a taking of plaintiffs' private property without just compensation, in violation of the Takings Clause of the Fifth Amendment. U.S. Const. amend. V.

In 1994, defendants filed motions to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.[9] The essence of defendants' arguments in the motion to dismiss was that no contract had been formed between the plaintiffs and the State of Rhode Island pursuant to § 36-9-33. On July 7, 1995, however, this Court denied those motions, holding that § 36-9-33 created an implied-in-fact contract as a matter of federal law. *See NEA-I*, 890 F. Supp. 1143.

The decision in *NEA-I* serves as the starting point for plaintiffs' arguments. Plaintiffs claim that only three issues bearing on Contract Clause analysis remained for further factual development after that opinion was issued: (1) whether the individual plaintiffs had actually relied on the contract created by § 36-9-33; (2) whether the Eviction Act was reasonable and necessary to preserve the Retirement System's status as a tax-exempt government plan; and (3) whether the Eviction Act was reasonable and necessary to correct the unfair results of § 36-9-33. Plaintiffs then argue that they have shown reliance by the individual plaintiffs, and defendants have not shown the Eviction Act to be reasonable and necessary to further either alleged purpose.

Furthermore, plaintiffs maintain that the Eviction Act does not survive rational basis review under the Due

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[9] The first motion was filed by defendant Nancy Mayer, in her official capacity as Chairperson and Treasurer of the Retirement Board. The second motion was filed by Joann Flaminio, in her official capacity as Executive Director of the Retirement Board.

Process Clause because the justifications offered by defendants are contrived. Plaintiffs also claim that the Eviction Act violates the Takings Clause because the individual plaintiffs had a property right entitled to constitutional protection that was "taken" for public use.

In contrast, in their motion for summary judgment presently before this Court and in their opposition to plaintiffs' cross-motion for summary judgment, defendants focus on analysis under the Contract Clause. First, defendants argue that in *NEA-I* this Court merely held that plaintiffs had sufficiently alleged the existence of a contract to survive defendants' motion to dismiss, and further factual development has revealed that no binding contract was created by § 36-9-33. Defendants also maintain that even if this Court were to find that § 36-9-33 created a contract, it was not an enforceable contract. In the alternative, defendants contend that the Eviction Act is constitutional nonetheless because it was reasonable and necessary to further legitimate government interests. More specifically, defendants claim that the Eviction Act was reasonable and necessary to preserve the Retirement System's status as a tax-exempt government plan, to preserve the Retirement System for the benefit of public employees, and/or to correct the error made by the General Assembly when it wrongly allowed the individual plaintiffs to receive benefits that are grossly disproportionate to the contributions they paid into the Retirement System.

In addition, defendants contend that the Eviction Act passes muster under takings analysis because plaintiffs did not have property rights that are compensable under the Takings Clause, the Eviction Act was justified by the need to remedy the unfair effects of § 36-9-33, and the Eviction Act merely terminates plaintiffs' rights to receive windfall benefits, not their contributions into the Retirement System. Finally, based largely on their analysis

under the Contract Clause, defendants argue that the Eviction Act passes the rational basis review required by the Due Process Clause.

In so arguing, defendants characterize the 1987 legislation as resulting from a political deal, "conceived and planned by several of the individual plaintiffs who were among the key beneficiaries of the statute's largesse." Arguing that § 36-9-33 was inherently unfair, defendants emphasize that it rendered some individual plaintiffs eligible to receive two pensions and yielded control over the public Retirement System to private employers, affording those employers the opportunity to affect the pension status of their employees by increasing their salary or allowing certain individuals to return to work after their alleged retirement.

After the parties filed their motions, however, the First Circuit decided *McGrath v. Rhode Island Retirement Bd.*, 88 F.3d 12 (1st Cir. 1996). In *McGrath*, the First Circuit found no violation of the Contract Clause when a municipal employee became ineligible to receive his pension pursuant to a change in the governing statute. In so holding, the First Circuit emphasized both the clause explicitly reserving the state's right to amend the terms of the statute (hereinafter the "reservation clause") and the fact that the employee's right to receive his pension had not yet vested.

At oral argument, which followed the *McGrath* decision, this Court directed the parties to the import of *McGrath* and whether it dictates that "vesting is everything" for purposes of the present case. More specifically, this Court suggested that, based on *McGrath*, an outright gift from the legislature, once conferred, would constitute a cognizable property interest with significance for analysis under the Takings Clause.

In that regard, defendants argue that vesting in *McGrath*, which involved a traditional pension context, is critically different from vesting in the sense of mere statutory eligibility at issue in the present case. Defendants equate vesting with service, and, in the absence of service to the state, they argue that no "true" vesting can occur. Since none of the individual plaintiffs in the present case vested in the "true" sense, defendants argue that their pension benefits may constitutionally be withdrawn.

In contrast, plaintiffs argue that *McGrath* clearly indicates that the individual plaintiffs with vested rights have a property interest in the receipt of those benefits. However, plaintiffs emphasize that the present case, unlike *McGrath*, does not involve a reservation clause. In the absence of such a clause, plaintiffs argue that § 36-9-33 bestowed a contractually enforceable right to receive pension benefits on all of the individual plaintiffs, and the state may not terminate those rights without just compensation.

After hearing oral argument on the cross-motions for summary judgment, the Court took the matter under advisement. The motions are now in order for decision.

II. Standard for Decision

A motion for summary judgment may be granted pursuant to Rule 56(c) of the Federal Rules of Civil Procedure as follows:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

A fact is "material" if it "has the capacity to sway the outcome of the litigation under the applicable law." *Nat'l Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir.), *cert. denied*, 515 U.S. 1103 (1995). A dispute is "genuine" if it "may reasonably be resolved in favor of either party." *Maldonado-Denis v. Castillo-Rodriguez*, 23 F.3d 576, 581 (1st Cir. 1994).

The movant has the initial burden of demonstrating that the case presents no genuine issue of material fact which requires resolution by trial. *See Cadle Co. v. John J. Hayes, III*, 116 F.3d 957, 1997 WL 343015, at *3 (1st Cir. June 26, 1997). The nonmoving party must then "contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *Nat'l Amusements, Inc. v. Town of Dedham*, 43 F.3d at 735.

On a motion for summary judgment, the Court must view the record and all reasonable inferences in the light most favorable to the nonmoving party. *See Continental Cas. Co. v. Canadian Universal Ins. Co.*, 924 F.2d 370, 373 (1st Cir. 1991).

III. Analysis

A. *The Import of McGrath*

This Court's first opinion in this case, *NEA-I*, concerned defendants' motions to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. In that opinion, this Court discussed, at length, whether § 36-9-33 established a contract between the State of Rhode Island and the individual plaintiffs, concluding that a contract was formed as a matter of federal constitutional law. Accordingly, this Court concluded that plaintiffs had sufficiently alleged a property interest in their retirement benefits with significance for purposes of the Contract, Due Process and Takings Clauses of the federal constitution.

Since this Court issued *NEA-I*, however, the legal landscape in the retirement plan context has changed considerably. Most notably, the First Circuit issued *McGrath v. Rhode Island Retirement Bd.*, 88 F.3d 12 (1st Cir. 1996). McGrath was a municipal employee who brought suit claiming, *inter alia*, a violation of the Contract Clause when the state deemed him to be ineligible to receive his pension pursuant to an amendment to the governing statute. The First Circuit found no constitutional infraction because McGrath's "pension rights had not yet vested when the modification occurred, and the state had reserved the power to alter or revoke its promise of retirement benefits to municipal employees at the time it established the plan . . ." *Id.* at 13.[10]

In so holding, the First Circuit explained that the "evolving legal doctrine" indicates that pension plans "are to be regarded as a species of unilateral contracts," rather than a gratuity bestowed by the state. *McGrath*, 88 F.3d at 16-17. *See also NEA-I*, 890 F. Supp. at 1153-1155 (describing the various ways in which courts have classified public pension systems). However, the Court expressed ambivalence about construing the pension plan at issue in *McGrath* as a contract, because the relevant statute contained the reservation clause, explicitly reserving the state's right to amend the pension system. *McGrath*, 88 F.3d at 17-18.

The Court then described "the emergent common-law rule" governing private-sector retirement plans with such reservation clauses:

> once an employee fulfills the service requirements entitling him or her to retirement benefits under a

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[10] R.I. Gen. Laws § 45-21-47 provides, in pertinent part:

> Reserved power to amend or repeal—Vested rights.—The right to amend, alter, or repeal this chapter at any time or from time to time is expressly reserved[.]

> pension plan, the employee acquires a contractual right to those benefits, and the employer cannot abridge that right despite its aboriginal reservation of a power to effect unilateral amendments or to terminate the plan outright.

Id. at 18-19. *McGrath*, however, involved a public-sector, rather than a private-sector, retirement plan, and the First Circuit acknowledged that this difference may be of critical import. Although the Court explained that fairness concerns militate for "comparability of treatment," it noted that it is well-established that statutes do not create contractual commitments "in the absence of an 'unmistakable' intent on the legislature's part to do so." *Id.* at 19 (quoting *United States v. Winstar*, 116 S.Ct. 2432 (1996) (discussing the "unmistakability doctrine")).

Ultimately, the First Circuit explicitly declined to decide whether McGrath was a party to a contract with the state by virtue of his retirement plan. Rather, the Court held:

> Assuming, for argument's sake, that such a contract has significance for purposes of the Contract Clause —a matter on which we take no view—it nonetheless is clear that under the contract terms, a member's right to a retirement annuity are not secure until he or she has met the age and service requirements established in the plan (and, therefore, has become vested).

Id. at 20.

In the wake of *McGrath*, it is clear that, in the view of the First Circuit, no contractually enforceable rights accrue under a public pension plan containing a reservation clause until vesting occurs. Moreover, the First Circuit explicitly defined "vesting" as fulfilling the prerequisites for retirement. *See also Parker v. Wakelin*, 937 F.

Supp. 46, 49 (D.Me. 1996) (defining "vesting" as referring to the satisfaction of the eligibility requirements for retirement). In the case of McGrath, the Court explicitly noted that McGrath would have had to fulfill both the age and service requirements for retirement in order to be considered "vested." *McGrath*, 88 F.3d at 20.

To be sure, the instant case, unlike *McGrath*, involves private employers. However, this difference does not render *McGrath* less salient for purposes of the present opinion. As explained above, the First Circuit did discuss the potential importance of the public-sector nature of McGrath's plan with respect to the issue of contractual intent. However, the Court never discussed the issue of private, rather than public, employers, and its analysis never depended upon the nature of the employer. Indeed, this difference is not significant for present purposes, because any contractual relationship or transfer of property right presently at issue allegedly occurred between the Retirement System and the individual, not the employer.

Moreover, although the First Circuit only faced McGrath's claim under the Contract Clause, its reasoning was clearly applicable to Takings Clause analysis as well. The First Circuit did not expressly hold that McGrath would have had a contract with the State of Rhode Island after his rights vested, but its reasoning indicated that, at vesting, an individual's right to receive his pension becomes "secure" and that individual has a property right worthy of constitutional protection. In this regard, the Contract Clause has been somewhat of a red herring in this case. Plaintiffs need not have received a contractual right, in particular, in order to merit constitutional protection. Rather, the relevant inquiry is whether plaintiffs have a cognizable property right, whether garnered by contract, gift, or otherwise.

B. *The Takings Clause*

Under the Takings Clause, "private property [may not] be taken for public use, without just compensation." U.S. Const. amend V. It is applicable to the states through the Fourteenth Amendment. *See, e.g., Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160 (1980). When faced with a challenge under the Takings Clause, the Supreme Court has considered three factors. First, a court must consider "the character of the action at issue." *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984) (quoting *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980)). Second, a court must assess the "economic impact" of the governmental action at issue. *Id.* Finally, a court must consider the action's "interference" with the "reasonable investment-backed expectations" of the private party. *Id.*

As will be explained below, under the reasoning of *McGrath*, this Court holds that only individual plaintiffs with vested rights to receive their pension have a "secure" property right protected under the Takings Clause. Therefore, takings analysis is necessarily different for differently-situated individual plaintiffs. This Court concludes that, for the purposes of the present opinion, the individual plaintiffs may be divided into four categories: (1) plaintiffs whose rights had not yet vested when the Eviction Act was passed (hereinafter "non-vested plaintiffs"); (2) plaintiffs with vested rights to their pension benefits who had retired by the time the Eviction Act was enacted (hereinafter "retired plaintiffs with vested rights"); (3) plaintiffs whose rights had vested prior to the passage of the Eviction Act who had not yet retired (hereinafter "active plaintiffs with vested rights"); and (4) plaintiffs whose status with respect to the Retirement System is presently a matter of dispute (hereinafter "remaining plaintiffs").

In categorizing the individual plaintiffs, this Court employs the same approach as the First Circuit in *McGrath*. More specifically, only those individual plaintiffs who had fulfilled the prerequisites for retirement set forth in § 36-10-9(a) by the time the Eviction Act was enacted will be considered to be "vested." Section 36-10-9(a) provides that an individual becomes eligible for retirement upon (a) reaching the age of sixty and completing ten years of service or (b) completing twenty-eight years of service. The fulfillment of these requirements renders an individual fully eligible to retire, and those are the requirements used by this Court in determining which individual plaintiffs achieved vested status prior to the enactment of the Eviction Act.

In so deciding, this Court rejects plaintiffs' broader definition of "vesting." Relying on § 36-10-9(c) (1991), which stated that individuals who purchased ten years of service credit prior to June 16, 1991 "shall be vested," plaintiffs argue that all individual plaintiffs who had ten years of service credit as of that date are vested, regardless of their age. However, as stated above, that provision is a grandfather clause allowing individuals who already had ten years worth of service credit to use those credits to fulfill the service requirement for retirement, even though only individuals who had actually contributed to the Retirement System for ten years would be eligible for retirement in the future. That provision did not alter the requirements for retirement found in § 36-10-9(a), and, as in *McGrath*, those are the requirements that this Court will consider when considering which plaintiffs are vested.

In addition, this Court rejects defendants' argument that "true" vesting must be equated with service to the state. Quite simply, there is no such thing as "true" vesting and vesting of some lesser sort. The General Assembly, through its established procedures, voted to allow

certain private-sector employees to participate in the Retirement System, and, therefore, the prerequisites they must fulfill for retirement are the same as they are for participating public-sector employees.

(1) *Non-vested plaintiffs*

Pursuant to *McGrath*, the non-vested plaintiffs did not have a property interest in their pension plan with significance for purposes of the Takings Clause. The situation of the non-vested plaintiffs with respect to the Retirement System is analogous to that of McGrath. Their right to receive their pension benefits was contingent upon the fulfillment of the prerequisites for retirement, and, as the First Circuit held, such rights are not "secure" prior to vesting.

Plaintiffs argue, however, that because the provision at issue in the present case does not contain an explicit reservation clause, even the non-vested plaintiffs have enforceable property rights. In contrast, defendants argue that § 36-10-7, a provision referring to the state's "intention" to fulfill the obligations of the Retirement System, is the functional equivalent of the reservation clause at issue in *McGrath*.

This Court concludes that § 36-10-7 is not the "functional equivalent" of the explicit reservation clause in *McGrath*. However, even in the absence of such a clause, it is abundantly clear that the State may amend the provisions of the Retirement System at any time (provided, of course, that just compensation is paid for any private property taken for public use). As the Supreme Court of Rhode Island has noted, "[p]ublic pensions have always been a heavily regulated legal arena. Therefore, individual expectations of immunity from future statutory change [are] unwarranted even if [such] provisions [are] contractual in nature." *Retired Adjunct Professors of the*

State of Rhode Island v. Almond, 690 A.2d 1342 (R.I. 1997) (holding that it was constitutionally permissible for the General Assembly to enact a law which altered the number of hours retired professors may work before losing their eligibility to receive their pension). Since the General Assembly could alter the Retirement System even without explicitly reserving its right to do so, there is no basis for holding that the non-vested plaintiffs have a "secure" right in the receipt of their pension benefits.[11]

This conclusion ends the takings inquiry, for, in the absence of a secure property right, there can be no "taking of private property for public use." *See Pro-Eco, Inc. v. Bd. of Comm'rs of Jay County, Indiana*, 57 F.3d 505, 510 (7th Cir.), *cert. denied*, 116 S.Ct. 672 (1995) ("the Board did not 'interfere with interests that were sufficiently bound with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment [Takings Clause] purposes' ") (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 125 (1978)). *But see Parker v. Wakelin*, 937 F. Supp. 46, 58, at n. 20 (D.Me. 1996) (assuming, without deciding, that non-vested plaintiffs had a property interest in the receipt of their pension benefits).

Therefore, the Eviction Act, as applied to the non-vested plaintiffs, passes muster under the Takings Clause.

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[11] In *McGrath*, the First Circuit noted that the argument that a state legislature may always amend its pension plan, even without an explicit reservation clause, "may be too simplistic" because "[a]n explicit reservation easily can be understood as a legislative effort to avoid creating a contractual obligation . . ." *McGrath*, 88 F.3d at 17, n.6. Although this note of caution strengthens the argument that a statute with an explicit reservaion clause will not create a binding contract, it does not indicate that statutes without such clauses create contractual rights. As the First Circuit recognized in *McGrath*, there are many obstacles to finding such commitments in legislative enactments. *Id.* at 19.

As the factual development in the present case reveals, the non-vested plaintiffs are John Callaci, Diana Casey, Denise Felice, Karen Comiskey Jenkins, Janice Lanik, Charlene Lee, Cornelius McAuliffe, Vincent Santaniello, Joan Silva, Diane Thurber, and Jeanette Woolley. Those individual plaintiffs had not yet fulfilled the age and service requirements for retirement when the Eviction Act was passed. Although Janice Lanik and Cornelius McAuliffe are presently retired, they retired only after the Eviction Act was enacted and were not vested at the time of the Act's passage. *See, e.g., Pro-Eco, Inc. v. Bd. of Comm'rs of Jay County, Indiana*, 57 F.3d at 509 ("the relevant inquiry" for purposes of takings analysis is "whether the claimant had a recognized property interest at the time the government entity acted").

(2) *Retired plaintiffs with vested rights*

The First Circuit did not expressly hold that McGrath would have had an enforceable property right if his rights had vested before the statutory change was implemented. However, the First Circuit's reasoning clearly indicates that retired plaintiffs with vested rights have a property right with significance for purposes of the Takings Clause. Indeed, the First Circuit expressed ambivalence concerning whether McGrath had a contract with the State of Rhode Island, but indicated that McGrath's right would become "secure" after vesting. *See McGrath*, 88 F.3d at 20. Furthermore, the absence of a reservation clause, if it has any effect, can only strengthen the retired plaintiffs' interest in their retirement benefits.

Since this Court holds that the retired plaintiffs with vested rights do have a property right in the receipt of their retirement annuity, this Court must evaluate the Eviction Act under the three prongs of the takings analysis. First, as this Court recognized in *NEA-I*, "[t]he

[Eviction] Act totally extinguishes all of the retirement benefits that the individual plaintiffs acquired pursuant to § 36-9-33 and upon which they have relied for four years." *Id.* at 1162 (discussing whether the Eviction Act substantially impairs the contractual relationship between the individual plaintiffs and the Retirement System). Second, in terminating these plaintiffs' rights to receive their pension, the Eviction Act interferes with such plaintiffs' "reasonable investment-backed expectations." Indeed, pursuant to § 36-9-33, the retired plaintiffs with vested rights had contributed to the Retirement System, received payments in accordance with their pension plan, and reasonably expected such payments to continue.

Defendants, however, argue that the effects of the Eviction Act are not severe enough to constitute a taking because the Act merely terminates plaintiffs' rights to receive "windfall benefits." Relying on *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) for the proposition that the loss of future profits does not constitute a taking, defendants make a weak attempt to separate plaintiffs' interest in their pension plan into three components: (1) plaintiffs' contributions to the Retirement System; (2) the accrued interest on those contributions, and (3) the purported "windfall benefit" comprising the rest of the pension to be received by plaintiffs.

This Court disagrees. In so arguing, defendants ignore the very essence of a pension plan—the payment of money in return for the security of receiving a future stream of payments. As such, a pension plan may not be divided into separate components. Since the Eviction Act only provides for the return of plaintiffs' contributions with interest, it completely terminates plaintiffs' rights to receive a pension, and that action is sufficiently severe to constitute a taking.

Similarly, defendants' argument that the individual plaintiffs could not have "reasonably" expected to receive pensions pursuant to § 36-9-33 because those pensions were grossly disproportionate to their contributions is misplaced. In so arguing, defendants misapprehend the term "reasonable" in the context of a takings inquiry. The individual plaintiffs' expectation of receiving their benefits was "reasonable," because that is what § 36-9-33 and the provisions of the Retirement System guaranteed them. Perhaps the return on plaintiffs' contributions was unwise in terms of fiscal planning, but, once enacted, § 36-9-33 had the force of law, and plaintiffs were reasonable in relying on its provisions.

Finally, defendants' argument that the Eviction Act does not transgress the Takings Clause because it was reasonable and necessary to correct the unfair effects of § 36-9-33 is of no moment. Quite simply, this is not the law. In so arguing, defendants ignore the basis for the Takings Clause: if the government must take private property for public use, as defendants argue was the case here, just compensation must be paid.

In this regard, this Court holds that the return of the retired plaintiffs' contributions with interest does not constitute just compensation. As explained above, the interest of these plaintiffs in receiving their pensions is greater than the value of their contributions. Accordingly, as just compensation, each retired plaintiff with vested rights is entitled to receive the full actuarial value of his or her share in the pension system.

As the facts of the present matter indicate, the retired plaintiffs with vested rights are Edward Casey, Jr., Bernard Connerton, Joseph Grande, Edward McElroy, and Bernard Singleton. Some of these plaintiffs had retired pursuant to an early retirement scheme, and, there-

fore, they did not have to attain the age of sixty in order to retire. However, they are still legally vested plaintiffs, as determined by the State of Rhode Island and its early retirement plan, and their right to receive their pension was a cognizable property right.

(3) *Active plaintiffs with vested rights*

In *McGrath*, the First Circuit explicitly declined to address the rights of active, as opposed to retired, employees whose rights to receive a retirement annuity had vested:

> It is unclear whether the legislature can pass and lawfully enforce an amendment that adversely affects an individual who has satisfied the age and years-in-service requirement but has not yet retired. This case does not present an appropriate occasion for us to explore this *terra incognito.*

McGrath, 88 F.3d at 20, n.9. However, the reasoning of *McGrath* indicates that active plaintiffs with vested rights have a property interest in their pension benefits that is significant for purposes of the Takings Clause.

In *McGrath*, the First Circuit equated vesting with fulfillment of the requirements for retirement. The Court, however, never mentioned retirement as a requirement for vesting, nor did it emphasize the actual receipt of pension payments as playing a role in its decision. Moreover, as is the case with retired plaintiffs, once an individual's right to receive a pension has vested, that individual has a reasonable investment-backed expectation of receiving the benefits. Indeed, that individual can retire and begin receiving a pension at any time.

Therefore, there is no principled way to distinguish retired plaintiffs with vested rights from active plaintiffs

with vested rights. For purposes of the Takings Clause, this is a distinction without a difference. For the foregoing reasons, this Court holds that the Eviction Act, as applied to plaintiffs Robert Casey, Robert Joy, and Harvey Press, is unconstitutional under the Takings Clause, and, therefore, they are entitled to just compensation on the same basis as retired plaintiffs with vested rights.

(4) *Remaining plaintiffs*

There are three remaining plaintiffs whose status with respect to the Retirement System is presently a matter of dispute. Those individuals are Richard DeOrsey, Ronald DiOrio, and Gloria Heisler. Defendants contend that these plaintiffs are not eligible to participate in the Retirement System for the following reasons. First, defendants claim that the entity for which Richard DeOrsey worked did not enter the Retirement System legally, and DeOrsey was not a full-time employee of that organization at the time it began to contribute to the Retirement System. Second, defendants claim that Ronald DiOrio, one of the plaintiffs who was allegedly responsible for lobbying the General Assembly concerning § 36-9-33, was not an employee of NEA-RI at the time it elected to participate in the Retirement System. Finally, defendants argue that Gloria Heisler worked for a corporation that was not covered by § 36-9-33, because it was not an organization "for the purpose of collective bargaining." In contrast, plaintiffs maintain that these three plaintiffs were in full compliance with § 36-9-33 and were properly admitted into the Retirement System.

In addition, plaintiffs argue that the eligibility status of these three individuals is not properly before this Court. They contend that the Retirement Board already deemed these plaintiffs to be eligible to participate in the Retirement System, and, in any event, there are proper ad-

ministrative channels for such re-evaluations. Citing *Perrotti v. Solomon*, 657 A.2d 1045 (R.I. 1995) for the proposition that the Retirement Board has the authority to render pension eligibility determinations and to re-evaluate such determinations, plaintiffs argue that this Court should not address these individual cases.

This Court does not dispute the authority of the Retirement Board to render such decisions. However, the authority of the Retirement Board and the authority of this Court are not mutually exclusive; the Retirement Board may have the authority to render such decisions, but that does not preclude this Court from exercising its own authority. Moreover, this Court must determine whether these individuals became *legally* vested, for it must weigh the constitutionality of the Eviction Act as applied to the individual plaintiffs. Indeed, as explained above, the determination of whether a particular plaintiff has a property right rests upon whether his or her right to receive a pension has legally vested. As defendants cogently argue, if this suit were brought by one plaintiff who was found to have entered the Retirement System illegally, that issue would be relevant to his constitutional claims. This result does not change merely because there are multiple plaintiffs. Therefore, the status of all plaintiffs must be clear for proper disposition of this case.

At the present time, there are questions of fact concerning whether these three plaintiffs are *legally* vested, and such factual disputes may not be properly resolved on a motion for summary judgment. Accordingly, the cross-motions for summary judgment are denied as to Richard DeOrsey, Ronald DiOrio, and Gloria Heisler.

C. *The Contract Clause*

The Contract Clause prohibits states from passing "any . . . Law impairing the Obligation of Contracts . . ." U.S.

Const. Art. 1, § 10. Although the Contract Clause has routinely been applied to contracts between states and private parties, *see, e.g., Fletcher v. Peck*, 10 U.S. 87, 137-139 (1810), its mandate "must be accommodated to the inherent police power of the State 'to safeguard the vital interests of its people.'" *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 410 (1983) (quoting *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 434 (1934)).

As this Court explained in *NEA-I*, in determining whether a state law violates the Contract Clause, courts perform a three-part analysis. *NEA-I*, 890 F. Supp. at 1151. First, a court "must decide whether the challenged law infringes a right that arises from a contract or a 'contractual agreement.'" *Id.* (quoting *Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451 (1985)). If a court concludes that the law at issue impairs a contractual right, it must then consider whether the impairmnet is substantial in nature. *NEA-I*, 890 F. Supp. at 1151. A challenged law may nonetheless survive scrutiny under the Contract Clause if "the impairment is 'reasonable and necessary to serve an important public purpose.'" *Id.* (quoting *United States Trust Co. v. New Jersey*, 431 U.S. 1, 25 (1977)).

The parties have submitted lengthy memoranda addressing all issues relevant to the Contract Clause. However, pursuant to *McGrath*, the Contract Clause claim of the non-vested plaintiffs fails on the first prong of the requisite analysis.[12] As stated above, in *McGrath*, the

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12 This Court's resolution of the claims of the vested plaintiffs under the Takings Clause renders it unnecessary to consider the claims of the vested plaintiffs under the Contract or Due Process Clauses. Moreover, a determination as to the status of the remaining plaintiffs awaits further proceedings. Therefore, the following inquiry need only apply to the non-vested plaintiffs.

First Circuit held that even if § 36-9-33 created a contract with significance for purposes of the Contract Clause, no rights accrued under that arrangement until the individual's rights to receive a pension vested. Therefore, the non-vested plaintiffs did not have an enforceable contractual arrangement with the state at the time the Eviction Act was passed. *See Parker v. Wakelin*, 937 F. Supp. 46 (D.Me. 1996) (holding that the statute governing a public pension plan created a contract between the State of Maine and vested plaintiffs, but not between the State of Maine and non-vested plaintiffs).

This conclusion is not altered merely because the statute presently at issue does not contain an explicit reservation clause. In *McGrath*, the First Circuit explained that a reservation clause may render illusory any potential contract created between the employees and the state pursuant to the provisions of the Retirement System. However, as explained above, it is well-established that the General Assembly may alter the Retirement System, and the First Circuit in *McGrath* clearly divided those individuals who have a "secure" right that may not be taken, from those who do not, at the point of vesting. Accordingly, even in the absence of a reservation clause, the non-vested plaintiffs did not have an enforceable contract right with the State of Rhode Island pursuant to § 36-9-33.

D. *The Due Process Clause*

There are two types of due process claims. Procedural due process notions prohibit the use of procedures that are constitutionally inadequate, while the "substantive component" of the Due Process Clause "bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (quoting

Daniels v. Williams, 474 U.S. 327, 331 (1986)). As the First Circuit has explained, "[a]s distinguished from its procedural cousin, then, a substantive due process inquiry focuses on 'what' the government has done, as opposed to 'how and when' the government did it." *Amsden v. Moran*, 904 F.2d 748, 754 (1st Cir. 1990), *cert. denied*, 498 U.S. 1041 (1991).

In the present case, the non-vested plaintiffs proceed under a theory of substantive due process, arguing that their prospective retirement benefits were "property interests that are entitled to protection from arbitrary state action." *NEA-I*, 890 F. Supp. at 1164. Defendants, however, contend that the Eviction Act passes the requisite rational basis review because it was reasonable and necessary to preserve the legitimate state purposes of preserving the Retirement System's status as a tax-exempt government plan and correcting the unfair effects of § 36-9-33.

To succeed in their substantive due process claim, the non-vested plaintiffs must prove that they had a property interest in their future retirement benefits. In addition, those plaintiffs must show that the Eviction Act which deprived them of those benefits was not "rationally related to a legitimate state purpose." *Parker v. Wakelin*, 937 F. Supp. 46, 58 (D.Me. 1996). *See also Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 491 (1955). The First Circuit has recognized that, "before a constitutional infringement occurs, state action must *in and of itself* be egregiously unacceptable, outrageous, or conscience-shocking." *Amsden v. Moran*, 904 F.2d at 754.

This Court need not explore the reasons for the passage of the Eviction Act, for *McGrath* dictates that the non-vested plaintiffs do not have a cognizable property interest in the receipt of their pension benefits. In *NEA-I*, in

analyzing plaintiffs' due process claim, this Court stated that "[i]n order to prove a property interest, plaintiffs must have 'alleged a tangible interest in [their pension benefits] sufficient to invoke the general constitutional protection against arbitrary and irrational government action.'" *NEA-I*, 890 F. Supp. at 1164 (quoting *Hoffman v. City of Warwick*, 909 F.2d 608, 618 (1st Cir. 1990)). This Court then concluded that plaintiffs had alleged the requisite "tangible interest" because they had a "reasonable expectation of receiving a pension benefit." *NEA-I*, 890 F. Supp. at 1164. However, as stated above, the First Circuit in *McGrath* explicitly held that McGrath did not have a "secure" right to receive his retirement annuity for purposes of analysis under the Contract Clause before his right to receive such an annuity vested. This reasoning bears on the present due process inquiry as well. Pursuant to *McGrath*, any interest the non-vested plaintiffs have in the receipt of their pension benefits is not a "secure" one and does not merit constitutional protection. As applied to the non-vested plaintiffs, therefore, the Eviction Act does not transgress the Due Process Clause of the Fourteenth Amendment.[13]

This Court is mindful that the First Circuit has embraced a somewhat broader definition of property for purposes of substantive due process. For example, in *Hoffman v. City of Warwick*, 909 F.2d 608, 618 (1st Cir. 1990), the First Circuit stated:

> Although the Repeal Statute did not deprive plaintiffs of a compensable property right, plaintiffs have alleged a tangible interest in the seniority benefits [at issue] sufficient to invoke the general constitu-

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[13] It should be clear by now that the absence of a reservation clause in the present case does not alter this conclusion.

> tional protection against arbitrary and irrational governmental action.

Moreover, in *McGrath*, the First Circuit only entertained McGrath's claim under the Contract Clause. However, even assuming that the non-vested plaintiffs had an interest in their pension benefits that was significant for purposes of substantive due process, the Eviction Act, as applied to the non-vested plaintiffs, nevertheless survives a substantive due process challenge, because there is nothing arbitrary or irrational about evicting non-vested, private employees from a public pension system.

As a final note, this Court was undeterred by defendants' argument that enforcing § 36-9-33 would violate public policy. In this regard, defendants' reliance on *Driscoll v. Burlington-Bristol Bridge Co.*, 86 A.2d 201 (N.J.), *cert. denied*, 344 U.S. 838 (1952) is misplaced. In *Driscoll*, the Supreme Court of New Jersey voided the purchase of two bridges by the Burlington County Bridge Commission because the purchase was "fraught with fraud and corruption." *Id.* at 221. In addition to the fact that *Driscoll* is, quite obviously, not binding on this Court, it is entirely distinguishable on its facts. Indeed, *Driscoll* involved a situation in which:

> [b]y 11:30 a.m., less than an hour from the time their meeting had commenced, the bridge commissioners [who had been appointed that morning] had organized and put through a $12,000,000 transaction of which they were totally ignorant only 18 hours before and about which they had no information or advice other than that furnished them by the sellers.

Id. at 216. In defendants' lengthy chronicle of § 36-9-33's passage, they do not allege the extensive corruption

addressed in *Driscoll*. Some of the individual plaintiffs may have engaged in extensive lobbying of the General Assembly in connection with the passage of § 36-9-33, as defendants allege, but the fact remains that § 36-9-33 was passed in accordance with the established procedures of the General Assembly.

This Court acknowledges that many of defendants' arguments are essentially attacks on the legitimacy of § 36-9-33. However, this Court's disposition of this matter does not rest upon an appraisal of the fairness (or lack thereof) of § 36-9-33. That provision may have been unwise, but once passed by the General Assembly in accordance with its rules, § 36-9-33 had legal significance. As plaintiffs argue, to the extent that defendants focus on the gross injustice of § 36-9-33, they merely argue for legislative reform, because such arguments are simply not relevant to the question at hand. The sole issue before this Court is whether § 36-9-33, whether wise or unwise, gave individual plaintiffs rights to receive retirement annuities which are worthy of constitutional protection.

The long and short of it is that the Eviction Act is unconstitutional as applied to all legally vested plaintiffs and is constitutional as applied to non-vested plaintiffs. Accordingly, the vested plaintiffs cannot be expelled from the Retirement System and the non-vested plaintiffs can. Therefore, the non-vested plaintiffs are entitled to receive a refund with interest for the contributions they paid into the Retirement System and plaintiffs NEA and RIFT are entitled to such a refund for what they contributed on behalf of the non-vested plaintiffs.

IV. CONCLUSION

For the foregoing reasons, plaintiffs' motion for summary judgment is granted in part and denied in part, and defendants' motion for summary judgment is granted in

part and denied in part. More specifically, plaintiffs' motion is granted as to plaintiffs Edward Casey, Jr., Robert Casey, Bernard Connerton, Joseph Grande, Robert Joy, Edward McElroy, Harvey Press, and Bernard Singleton, and those plaintiffs shall continue to participate in the Retirement System as they did prior to the passage of the Eviction Act or just compensation must be paid to them. Defendants' motion for summary judgment is granted as to plaintiffs John Callaci, Diana Casey, Denise Felice, Karen Comiskey Jenkins, Janice Lanik, Charlene Lee, Cornelius McAuliffe, Vincent Santaniello, Joan Silva, Diane Thurber, and Jeanette Woolley and they may be evicted from the Retirement System. The cross-motions for summary judgment are denied with respect to plaintiffs Richard DeOrsey, Ronald L. DiOrio, and Gloria Heisler. A bench trial on the merits will be scheduled as to those three plaintiffs to determine if they legally vested.

Since the First Circuit abhors piecemeal appeals, *see, e.g., Consol. Rail Corp. v. Fore River Ry. Co.*, 861 F.2d 322, 325 (1st Cir. 1988), no judgments will enter until all claims are resolved.

It is so ordered.

/s/ Ronald R. Lagueux
RONALD R. LAGUEUX
Chief Judge
August 7, 1997

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Civil Action No. 94-0389L

NATIONAL EDUCATION ASSOCIATION-RHODE ISLAND, by its Secretary, Tia Scigulinsky, RHODE ISLAND FEDERATION OF TEACHERS, by its Secretary, Coleen Bielecki, JOHN CALLACI, DIANA CASEY, EDWARD CASEY, JR., ROBERT CASEY, BERNARD CONNERTON, RONALD DIORIO, DENISE FELICE, JOSEPH GRANDE, GLORIA HEISLER, KAREN COMISKEY JENKINS, ROBERT JOY, JANICE LANIK, CHARLENE LEE, CORNELIUS MCAULIFFE, EDWARD MCELROY, HARVEY PRESS, VINCENT SANTANIELLO, JOAN SILVA, BERNARD SINGLETON, DIANE THURBER, and JEANNETTE WOOLEY,

Plaintiffs,

v.

RETIREMENT BOARD OF THE RHODE ISLAND EMPLOYEES' RETIREMENT SYSTEM, NANCY MAYER, Chairperson and Treasurer of the Retirement Board of the Rhode Island Employees' Retirement System in her official capacity, and JOANN FLAMINIO, Executive Director of the Retirement Board of the Rhode Island Employees' Retirement System in her official capacity,

Defendants.

MEMORANDUM AND ORDER

Ronald R. Lagueux, Chief Judge.

This matter is before the Court on two identical motions to dismiss under Rule 12(b)(6). The first motion

was filed by Defendant Nancy Mayer ("Mayer") in her official capacity as Chairperson and Treasurer of the Retirement Board of the Rhode Island Employees' Retirement System ("Retirement Board"). The second motion was filed by Defendants Retirement Board and Joann Flaminio ("Flaminio"), in her official capacity as Executive Director of the Retirement Board. Defendants' motions [1] assert that plaintiffs' Complaint, challenging the constitutionality of R.I. Gen. Laws §§ 36-9.1-2, fails to state any legal claims for relief. For the following reasons, defendants' motions are denied.

I. UNDISPUTED BACKGROUND FACTS

On July 3, 1987, the Rhode Island General Assembly enacted a statute that allowed individuals who were or had been "full-time employees of organizations representing employees of the state and/or any political subdivisions thereof for the purposes of collective bargaining" to acquire certain benefits under the Rhode Island Employees' Retirement System ("Retirement System" or "System"). That statute, R.I. Gen. Laws § 36-9-33, stated:

> (a) The provisions of chapters 8 through 10 of this title, inclusive, [which establish the terms of the Retirement System,] shall apply to full-time employees or organizations representing employees of the state and/or any political subdivisions thereof for the purposes of collective bargaining; provided, that any such organization must elect to be covered by the provisions of chapters 8 through 10 of this title by forwarding a certified vote of the organization's appropriate authority to the retirement board not later than December 31, 1988; and provided further, that

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[1] Though the defendants have filed separate motions, this Court will consider all of the arguments made by both movants. This opinion will not distinguish between the two motions.

participation shall not begin later than July 1, 1989. The organization's contribution shall be at the same rate as the contribution of a local education agency for certified teachers. All employees in service as of the date of said certified vote shall become members unless they notify the retirement board, in writing, within sixty (60) days from the date of said certified vote, that they do not wish to become members.

(b) Any member of the state employees' retirement system or any full-time employee of an organization representing employees of the state and/or any political subdivision thereof for the purposes of collective bargaining, who has prior hereto been a full-time employee of such an organization or who has been employed by any public school district in-state or out-of-state, may purchase credit for such employment. The cost to purchase said credits shall be ten percent (10%) of the employee's first year's earnings as a full time employee of such an organization multiplied by the number of years, and any fraction thereof, of such employment. Provided further, that any such employee who has an official leave of absence from such organization shall be eligible to purchase credits as hereinbefore provided for the period of such leave of absence.

Pursuant to § 36-9-33(a), plaintiffs National Education Association-Rhode Island ("NEA-RI") and Rhode Island Federation of Teachers ("RIFT") elected to be covered by the Retirement System. After this election, certain union employees, now the individual plaintiffs in this action, filed applications with the Retirement Board. The Retirement Board is the administrative body that operates the Retirement System.

On June 6, 1988, while the individual plaintiffs' applications were pending before the Retirement Board, the

Rhode Island General Assembly repealed § 36-9-33. Pub. L. 1988, ch. 486 (hereinafter "Repeal Statute"). After passage of the Repeal Statute, the Retirement Board refused to allow the individual plaintiffs to become members of, to accrue future service credits in, or to purchase additional service credits from the Retirement System. Their option to join the system had been rescinded.

On October 20, 1988, NEA-RI, RIFT and other organizational and individual plaintiffs brought suit against the Retirement System and the Executive Director of the the Retirement Board in Rhode Island Superior Court. The plaintiffs in that case sought an order directing the defendants to "grant the applications [of the individual plaintiffs] . . . and comply with the provisions of Section 36-9-33 [with respect to the individual plaintiffs]." The question before the Superior Court was one of statutory interpretation, i.e., whether the Repeal Statute had a retroactive, as well as prospective, effect. If the Repeal Statute operated both prospectively and retroactively, then plaintiffs could not become part of the Retirement System.

On December 11, 1989, a judge of the Rhode Island Superior Court issued an order granting the relief requested by the plaintiffs. He found that the individual plaintiffs, who had filed their applications with the Retirement Board during the approximately 11-month period in which § 36-9-33 was in effect, had satisfied the eligibility requirements of § 36-9-33 and were, therefore, entitled to participate in the Retirement System. He also concluded that the repeal of § 36-9-33 operated prospectively only, and that the plaintiffs were unaffected by its repeal.

On April 23, 1990, the same Superior Court judge issued a further opinion in the same case, in response to a Petition for Clarification and/or Instructions by both sides. He held that the individual plaintiffs "shall be

treated as becoming members of the Retirement System as of . . . January 1, 1990." For reasons unknown, neither of these decisions of the Superior Court was appealed to the Rhode Island Supreme Court.

Since the orders of the Superior Court became final because of a failure to appeal, the Retirement Board granted the applications that had been filed by the individual plaintiffs. Per the order of the Superior Court, the individual plaintiffs became members of the Retirement System on January 1, 1990. On that date, the individual plaintiffs began accruing future service credits in and/or received additional service credits in the Retirement System. In addition, the individual plaintiffs either began or continued to contribute 7.5% of their salaries to the Retirement System.

Also on January 1, 1990, NEA-RI and RIFT and its affiliates became employers in the Retirement System. They, too, were required from that day forward to contribute to the Retirement System on behalf of the individual plaintiffs at the same rate as did the local school committees on behalf of their certified teachers. *See* R.I. Gen. Laws § 36-9-33(a). In addition, some of the plaintiffs purchased past service credits in the system by paying the amount prescribed in the statute. *See* R.I. Gen. Laws § 36-9-33(b).

Plaintiffs allege in their Complaint that many of them relied on their entry into the Retirement System and future receipt of state pension benefits in making important decisions in their lives. For example, many based employment choices and decisions about savings for their retirement years on their participation in the System. Specifically, plaintiffs contend that: (1) certain individual plaintiffs who had taken temporary leaves of absence from their employment with public school districts to work

as full-time employees of NEA-RI or RIFT decided not to return to their school districts, thereby relinquishing their right to continue to participate in the Retirement System as teachers; (2) some individual plaintiffs decided to remain in the employ of NEA-RI or RIFT, and not pursue other employment opportunities; and (3) seven of the individual plaintiffs elected to retire in order to receive the retirement benefits to which they became entitled under the Retirement System, including the benefits acquired pursuant to Section 36-9-33, and others have made plans and commitments in anticipation of receiving such retirement benefits. Complaint, ¶ 18.

During the 1994 Session of the Rhode Island General Assembly, two identical bills, entitled "An Act Relating to Public Officers and Employees—Evicting Non-Employee and Non-Teacher Members from the Retirement System," were introduced into the Rhode Island Senate and House at the request of defendant Mayer, who is General Treasurer of the State of Rhode Island. As indicated in explanatory language that accompanied the bills themselves, their purpose was to retroactively extinguish or reduce retirement benefits of the individual plaintiffs by "evict-[ing] . . . from the retirement systems . . . individuals who were permitted to join or purchase credits, through special pension legislation passed in 1987 [i.e., Section 36-9-33] and repealed in 1988."

The Rhode Island General Assembly enacted the bills on July 15, 1994. R.I. Gen. Laws §§ 36-9.1-1 to -2 (hereinafter "Eviction Act"). The Eviction Act provides in full as follows:

> 36-9.1-1. Findings
>
> The General Assembly hereby finds the following: The grant of the opportunity to an individual to purchase, pursuant to Chapter 613 of The Public Laws

of 1987, as codified in § 36-9-33 (repealed by PL 88-486), (hereinafter "§ 36-9-33, repealed"), credit in, and/or to become a member of the Retirement Systems established under chapter 16 of Title 16, chapter 21 of title 45, and/or chapters 8-10, inclusive of this title ("Retirement Systems") bears no rational relationship to any legitimate governmental purpose. The continued accrual of benefits by the beneficiaries of § 36-9-33 (repealed) and the continued payment of monies under § 36-9-33 (repealed) will cause an invasion of the corpus of the Retirement Systems funds in abrogation of those sections of the Internal Revenue Code of 1986 as amended from time to time which apply to governmental plans (including but not limited to 401(a) and 401(f)), and does not further the purposes behind the Retirement Systems.

36-9.1-2. Status of non-employee and non-teachers members.

(a) Any individual who became a member of the Retirement Systems based solely on § 36-9-33 (repealed), or who purchased credit in the Retirement Systems based upon § 36-9-33 (repealed), shall no longer be entitled to such membership and/or such credit(s) and shall no longer receive any benefits of any type from said Retirement Systems which was based upon § 36-9-33 (repealed). By January 1, 1995, the Retirement System shall return any contribuitons or purchases made pursuant to § 36-9-33 (repealed) by said individual and/or said individual's employer, with interest at the actuarially assumed rate earned by the Retirement Systems on its pension funds during the applicable time period since such contributions and/or purchase was made.

(b) Said return of such contributions or purchases shall be offset by any benefits already received by said individual from the retirement system.

(c) Nothing in this chapter shall be construed as prohibiting any individual from later becoming a member of the Retirement Systems or purchasing credits, in accordance with the applicable law.

R. I. Gen. Laws §§ 36-9.1-1. to -2 (1994 Supplement).

Not long after the passage of the Eviction Act, plaintiffs filed suit in this Court. Plaintiffs contend that the Eviction Act violates three provisions of the United States Constitution. First, plaintiffs allege that the Act impairs plaintiffs' contractual rights in violation of the Contract Clause. U.S. Const. Art. I, § 10. Second, plaintiffs aver that the Act deprives plaintiffs of property without due process of law, in contravention of the Fourteenth Amendment. U.S. Const. amend. XIV. Finally, plaintiffs posit that the Act constitutes a taking of plaintiffs' private property without just compensation, in contravention of the Takings Clause of the Fifth Amendment, applicable to the states through the Fourteenth Amendment. U.S. Const. amend. V. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160, 101 S. Ct. 446, 450, 66 L.Ed.2d 358 (1980). Defendants' motions to dismiss contest the validity of each of these causes of action as a matter of law.

After hearing oral argument on the joint motions to dismiss, the Court took this matter under advisement. In the interim, plaintiffs filed a motion for preliminary injunction. The aim of the injunction was to prevent the state from refunding plaintiffs' contributions to the Retirement System, which, according to the Eviction Act, was to occur on January 1, 1995. The Court granted that motion. Therefore, no refund will occur pending the

outcome of this case on its merits. At this point, the defendants' motions to dismiss are in order for decision.

II. STANDARD OF REVIEW

To decide a motion to dismiss under Rule 12(b)(6), a court must accept all allegations in the plaintiffs' complaint as true. *In Re Ballard Shipping Co.*, 810 F. Supp. 359, 361 (D.R.I. 1990), *aff'd in part, rev'd in part*, 32 F.3d 623 (1st Cir. 1994). A court should only grant a motion to dismiss under 12(b)(6) if plaintiffs cannot prove any set of facts in support of their claims that would entitle them to relief. *Rockwell v. Cape Cod Hospital*, 26 F.3d 254, 255 (1st Cir. 1994); *Morgan v. Ellerthorpe*, 785 F. Supp. 295, 299 (D.R.I. 1992). To be successful on their motion in this case, defendants have the burden of showing that the plaintiffs' claims are insufficient as a matter of law. *National Credit Union Admin. Bd. v. Regine*, 795 F. Supp. 59, 62 (D.R.I. 1992). The question before this Court, therefore, is whether the Complaint, viewed in the light most favorable to plaintiffs and with every doubt resolved on their behalf, states any valid claim for relief. 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357 (1990).

III. ANALYSIS

A. The Contract Clause

Plaintiffs' first cause of action proceeds under the Contract Cause and 42 U.S.C. § 1983. Plaintiffs claim that before the enactment of the Eviction Act in 1994, they were party to a contract with the Retirement System.[2]

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[2] This Court may refer to the contract that plaintiffs seek to prove as either a contract with the Retirement System or a contract with the State.

By removing both the individual plaintiffs (as members) and NEA-RI and RIFT (as employers) from the Retirement System, the Eviction Act, in plaintiffs' view, substantially impairs those contractual rights in violation of the Contract Clause. Defendants have moved to dismiss plaintiffs' first claim, arguing that § 36-9-33 does not create a contract as a matter of law and that, as a consequence, plaintiffs have not stated any actionable claim.

The Contract Clause reads: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const. Art. I, § 10. Originally, the Contract Clause was intended to "protect *private* contracts from improvident majoritarian impairment." Laurence Tribe, *American Constitutional Law* § 9-8, at 613 (1988) (emphasis added). However, since its first interpretation by the Supreme Court in *Fletcher v. Peck*, 10 U.S. (6 Cranch.) 87, 3 L.Ed. 162 (1810), the Contract Clause has been interpreted to apply to legislative impairments of "public" contracts, or contacts to which the state or its agent is a party. Therefore, plaintiffs' Contract Clause claim, which alleges the impairment of a contract between plaintiffs and the Retirement System, is properly before this Court. That the Retirement Board is a state agency is not problematic to plaintiffs' Contract Clause claim.

In determining whether a state law violates the Contract Clause, a court must perform a three-part analysis. First, the Court must decide whether the challenged law infringes a right that arises from a contract or a "contractual agreement." *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 465, 105 S. Ct. 1441, 1451, 84 L.Ed.2d 432 (1985); *Dodge v. Board of Education*, 302 U.S. 74, 79, 58 S. Ct. 98, 82 L.Ed. 57 (1937). If a contractual right has been impaired, the Court must next determine whether that impairment has been substantial. If the impairment is

not significant, the Court's inquiry ends. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411, 103 S. Ct. 697, 704, 74 L.Ed.2d 569 (1983). If, however, the impairment is substantial, the Court must determine whether the impairment is "reasonable and necessary to serve an important public purpose." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 25, 97 S. Ct. 1505, 1520, 52 L.Ed.2d 92 (1977). If the statute is neither reasonable nor necessary to serve an important public purpose, then the statute is unconstitutional. The test is one of intermediate scrutiny.

1. The Existence of a Contract

At this point, it is important to clarify the question that is before the Court. The question is whether plaintiffs have sufficienly alleged that, at the time that the Eviction Act was passed, they were party to a contract with the Retirement System *as a matter of federal constitutional law. Nevada Employees Assoc., Inc. v. Keating*, 903 F.2d 1223, 1227 (9th Cir. 1990). The alleged contract between the plaintiff and the Retirement System arises out of Chapter 8 through 10 of Title 36 of Rhode Island General Laws, the legislative scheme that governs the Retirement System.[3]

This Court notes that there is a strong presumption against interpreting statutes as contractual agreements. *National R.R. Passenger Corp.*, 470 U.S. at 465-66; *Hoff-*

[3] Defendants urge this court to examine only § 36-9-33, and not the remainder of Chapters 8 through 10 of Title 36, to find a contract. This, however, is counterintuitive to plaintiffs' claim. Plaintiffs allege they were party to a contract when the Eviction Act was passed in 1994. At that time, plaintiffs had been participants in the Retirement System for four years, and the terms of their relationship with the State was contained in Chapters 8 through 10 of Title 36. Thus, it is those statutes that must be examined.

man v. City of Warwick, 909 F.2d 608 (1st Cir. 1990). Normally, state statutory enactments do not of their own force create a contract with those whom the statute benefits. Hoffman, 909 F.2d at 614. However, that presumption can be overcome if the language of the statute and other indicia show that the legislature intended to bind itself contractually. *State of Indiana ex. rel. Anderson v. Brand*, 303 U.S. 95, 58 S. Ct. 443, 82 L.Ed. 685 (1938); *Brennan v. Kirby*, 529 A.2d 633 (R.I. 1987). This is no small hurdle to vault. The party asserting the creation of a statutory contract must prove that the legislation is "intended to create private contractual or vested rights" and not merely declaratory of "a policy to be pursued until the legislature . . . ordains otherwise." *National R.R. Passenger Corp.*, 470 U.S. at 466.

Paramount among the indicators to be examined when determining whether a statute constitutes a contractual offer is the language of the statute itself. *Dodge*, 302 U.S. at 78. If the language of the statute expressly indicates that the statute is being enacted to form a contract, *see, e.g.*, Mass. Gen. Laws c. 32 § 25 (establishing "membership in the retirement system as a contractual relationship under which members are entitled to contractual rights and benefits"), a determination that the state is party to a binding obligation is clear. Short of an express indication, however, the language of the statute must adequately express actual intent on the part of the state to bind itself in order for the statute to be considered a contract. *National R.R. Passenger Corp.*, 470 U.S. at 466-67. Both the words of the statute and their effect must be examined. *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 17 n.14, 97 S. Ct. 1505, 1515 n.14, 52 L.Ed 2d 92 (1977); *Brennan v. Kirby*, 529 A.2d 633, 637 (R.I. 1987).

A close examination of the language of Chapters 8 through 10 of Title 36 does not compel the conclusion that plaintiffs are party to an express legislative contract, though neither does it preclude it. Although at no point do the words "contract," "consideration," "reliance," "offer," or "acceptance" appear, certain sections are expressed in terms of mutual obligations, duties and rights. For example, Section 36-10-9(c) provides that "a person who has ten (10) years of service credit on or before June 16, 1991 shall be vested." Whether statutorily-defined vesting rises to the level of a contract is unclear, though it does suggest some right or interest. Section 36-10-8, concerning the refund of contributions for members who withdraw from public service or who cease to participate in the System for any other reason than death or retirement, reads "[a]ny member receiving a refund shall thereby forfeit and relinquish all accrued rights as a member of the system. . . ." These so-called "rights as members of the system" may or may not be contractual.

Section 36-10-7 reads in part:

> [I]t is the intention of the state to make payment of the annuities, benefits, and retirement allowances provided for under the provisions of this chapter and to that end that it is the intention of the state to make the appropriations required by the state to meet its obligations to the extent provided in this chapter. The general assembly shall make annual appropriations which shall be sufficient to provide for the payment of the annuities, benefits, and retirement allowances required of the state under this chapter.

R.I. Gen. Laws § 36-10-7. Whether this "intention" rises to the level of a contract is also unclear. Finally, the strongest evidence of contract may come from Section 36-10-1, which refers to the amount that participants in the

Retirement System must contribute. It speaks in terms of how much individuals "shall" pay and states that "[e]very member shall be deemed to consent and agree" to contributory deductions to be taken from his or her paycheck. Thus, when viewed collectively, the precise language of the Retirement System is indefinite, and both sides make some reasonable arguments as to the best interpretation. Read one way, they suggest a contract; read another, they merely express an intention to act.

It is clear, however, that this Court is not limited to an examination of statutory language when it determines whether a statute amounts to a contract. *Hoffman*, 909 F.2d at 614 (*citing U.S. Trust*, 431 U.S. 1, 17 n.14 (1977)). "[A] statute is itself treated as a contract when the *language and circumstances* evince a legislative intent to create private rights of a contractual nature enforceable against the State." *United States Trust*, 431 U.S. at 17 n.14 (emphasis added). In other words, if plaintiffs have sufficiently alleged that the language and the circumstances of this statute amount to an implied contract, their case must be allowed to proceed. If such a contractual relationship does exist, the terms of the agreement will be contained in the statutes creating the Retirement System.

In order to determine whether plaintiffs are party to an implied contract with the state, this Court will consider three factors. First, this Court will consider the manner in which other courts have treated state pension systems. This information will reflect the current legal climate for understanding pension systems and provide some insight into the legislative intent motivating these enactments. Second, this Court will consider any relevant Rhode Island law on this issue. Clearly, Rhode Island law explaining the effect of the State's pension system will contribute to an understanding of the effect of the legislation

on both the State and the plaintiffs. Finally, in light of that discussion, this Court will apply the law of contracts to the enactments in this case, and take into account any relevant equitable considerations.

a. Legal Background of Public Pension Systems

Over the last century, courts have heard a variety of challenges to legislative modifications to pension systems in which plaintiffs have claimed that a pension system constitutes a contract between themselves and the state.[4] In response to these claims, courts have developed a spectrum of models within which a pension system can be categorized. At one end of the spectrum lies the gratuity model. Under the gratuity model, workers have no rights in their expected pensions. Pensions are considered a gift from the state, and the pension benefits can be revoked or modified at any time. At the other end of the spectrum lies the contract model. Under the contract model, workers have contractual interests in their pensions. While the amount of protection varies from state to state (from near absolute protection to hardly any at all), workers may still bring challenges to state action alleging the unilateral impairment of a contract. Between the gratuity model and the contract model are models of implied contractual rights. Here, too, the level of protection for a participant differs from state to state, and the interpretive principles from which these models are derived are varied.

The gratuity view originated in the case of *Pennie v. Reis*, 132 U.S. 464, 10 S. Ct. 149, 33 L.Ed. 426 (1889). In that case, the Supreme Court upheld state legislation

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[4] These claims have proceeded both under breach of contract theories or under constitutional impairment of contract theories. The matter that is before this Court is clearly of federal constitutional dimension.

repealing a $1,000 death benefit payable from California's public pension system. The Court held that the state employees had no vested interest in receiving the benefit, basing its holding on both the compulsory nature of the system and on the fact that contributing public employees had money withheld from their paychecks, rather than paying directly from their pockets. The Court also rejected the argument that the state had created a contract to continue the benefits perpetually.

The gratuity model was born during a time when pensions were considered a gift from the state, when employees did not contribute to the system, and when pension benefits were insignificant in amount. *See* W. Greenaugh & F. King, *Pension Plans and Public Policy,* at 27-62. The gratuity model was therefore developed from the perspective of state legislatures, who worried about the financial burdens of providing pensions. By labelling the pension system a gratuity, courts freed the legislatures to make unilateral modifications to those systems without Contract Clause or common law contract consequences. Since employees did not contribute to the system, they lost nothing except the "insignificant," "free" pension that they would have otherwise received.

The ideological opposite of the gratuity model is the pure contract model. A good example of this model is the Arizona Supreme Court's decision in *Yeazell v. Copins,* 98 Ariz. 109, 402 P.2d 541 (1965). In that case, the Court allowed a police officer who had requested that his benefits be calculated pursuant to a repealed statute to prevail. The Court held that since the original statute had been part of the retirement system at the time the officer had accepted employment, he was entitled to take advantage of its terms. According to the Court, the police officer's rights in the pension vested at the time that

he began his employment. Any subsequent changes to the pension system were inappropriate unilateral modifications to the contract between the officer and the state.

Unlike the gratuity model, the contract model was developed from the perspective of state employees. It preserves the expectations of employees who make career decisions, retirement savings, and life plans in relation to the receipt of state pensions. In addition, the contract model reflects the principle of exchange. Either employee contributions are interpreted as money given to purchase retirement credits or, alternatively, the pension is seen as deferred compensation for lifetime work for the state at a lower wage. When a pension system is labelled contractual, both the Contract Clause and the common law of contracts may be used to prevent certain unilateral modifications to it.

In between the two ends of the spectrum are models of implied rights. These models cannot be neatly categorized, as the legal reasoning with which contracts are implied and the subsequent protections those implied contracts are given vary from state to state. Therefore, two different examples of models will serve to highlight some portion of this middle area of the spectrum.

The traditional, implied in law contract model was developed in 1917 by the California Supreme Court in *O'Dea v. Cook*, 176 Cal. 659, 169 P. 366 (1917). According to the California model, employees acquire limited contractual rights at the time that they enter the pension system. The rights are then granted full protection when the employees retire. Before then, the government may make only reasonable modifications to the pension system. In later cases, California has held that "reasonable modifications to the pension system" require some material

relation to the purpose of the pension system and an "offsetting advantage" when these systemic changes are detrimental to an employee. *Allen v. City of Long Beach*, 45 Cal. 2d 128, 287 P.2d 765 (1955).

The Supreme Court of Minnesota has developed a unique, implied in law model that is based on principles of promissory estoppel. In *Christensen v. Minneapolis Municipal Employees Retirement Board*, 331 N.W.2d 740 (Minn. 1983), the Court prevented the retirement board from enforcing an amended pension statute that changed the minimum retirement age for a retired employee. The Court expressly rejected the theory that a pension was a gratuity of the state and that the state could therefore make unilateral changes to the system without consideration of the effect on the employees. Instead, the Court held that the statutory pension system amounted to a promise that the state made to its employees. This promise was enforceable through principles of promissory estoppel, as the employees foreseeably relied on it to their detriment. As the Court said, "[i]n the realities of the modern employment marketplace, the state reasonably expects its promise of a retirement program to induce persons to accept and remain in public emloyment, and persons are so induced, and injustice can be avoided only by enforcement of that promise." 331 N.W.2d at 747. No other state uses the promissory estoppel model.

Regardless of the actual version used, the purpose of the implied rights model is to try to achieve a balance between the rights of the state and the employees. Clearly, an employee has an expectation of receiving a pension and makes many of life's decisions based on the security of receiving a pension. The right to receive a pension should therefore, be protected. It is equally clear, however, that a state may, from time to time, incur significant financial

obligations, and a pension system's fiscal integrity may well be at stake. The state, therefore, may seek to rearrange its obligations to avoid the pension system's collapse.

The implied rights model recognizes these two valid concerns. On one hand, a state legislature should be allowed to make changes to modernize the pension system without having a Contract Clause or breach of contract lawsuit filed each time it so acts. On the other hand, by recognizing the employees' rights and reasonable expectations in receiving their pensions, this model only allows reasonable legislative modifications, which are those that do not unfairly damage particular employees in order to achieve a generalized financial benefit to the system.

The prevailing view nationally, as a matter of state law, is to reject both the gratuity and the inflexible contract models in favor of others that lie somewhere towards the center of the spectrum. *See, e.g.*, Note, Public Employee Pensions in Times of Fiscal Distress, 90 Harv. L. Rev. 992, 994-98 (1977) (criticizing the gratuity approach). The rationale for the adoption of some form of implied contractual approach, however, is not monolithic. *See* Andrew C. Mackenzie, Note, *Spiller v. State*: Determining the Nature of Public Employees' Rights To Their Pensions, 46 Me. L. Rev. 355, 359 (1994). At least six states rely on their constitutions, *see, e.g.*, N.Y. Const. art. V., others rely on the direct language of state statutes themselves, *see, e.g.*, Mass. Gen. Laws c.32 § 25, and still others have relied on their courts to interpret statutes. Although no clear consensus has developed as to which of the models achieves the best balance, it is clear that some sort of compromise between the interests of the state and the expectations of employees is appropriate. The models that stand at the ends of the spectrum no longer reflect the modern understanding of pension systems.

Within each portion of the spectrum (gratuity, implied contract or contract), there are further variations which distinguish the law from state to state. For instance, one major difference is when an employee's pension rights vest. Some courts hold that a pension right is completely vested once the employment contract is signed and the employee begins to work. In those states, the employee may take legal action immediately with respect to his or her express or implied contract to receive a pension. *See, e.g., Leonard v. City of Seattle,* 81 Wash. 2d 479, 503 P.2d 741 (1972). Other courts hold that the employee's rights only vest when he or she has satisfied the eligibility requirements to receive the pension. Those employees must therefore wait until their rights mature to assert them. *See, e.g., Wright v. Allegheny County Retirement Board,* 390 Pa. 75, 134 A.2d 231 (1957). Beyond vesting differences, another fundamental question—the amount of protection that employees receive—varies within the different contract models from near absolute to very little. *Cf. Yeazell v. Copins,* 402 P.2d 541 (Ariz. 1965) *with City of Dallas v. Trammel,* 129 Tex. 150, 101 S.W.2d 1009 (1937).

To some extent, these additional differences between contract models are also designed to balance the competing policy considerations that have compelled the courts to develop the contractual spectrum. By restricting the times during which the employees can assert their rights, or by limiting the relief that accompany a strict contract violation, courts have sought to fine tune the balance between the competing interests of employees and of the state in managing the pension system.

b. Rhode Island Law

The Rhode Island Supreme Court has acknowledged these competing policy considerations and the spectrum of

pension models that has consequently developed. However, the Court has refrained from precisely categorizing its public pension system at any one point on that spectrum. The closest that it has come was in *In Re Almeida*, 611 A.2d 1375 (R.I. 1992) (hereinafter *Almeida*). In that case, the Rhode Island Supreme Court reviewed a petition of Antonio S. Almeida, a retired Justice of the Rhode Island Superior Court. Almeida had petitioned that the Court reject the disciplinary recommendation of the Commission on Judicial Tenure and Discipline, who had found Almeida guilty of illegal and unethical conduct. The Commission had recommended that he be removed from office and that his pension benefits be terminated retroactively to the date of his retirement. Almeida did not contest the recommendation that he should be removed from office, but he argued that termination of his statutorily awarded pension was beyond the power of the court.

The Court disagreed. In terminating Almeida's pension benefits, the Court noted that honorable and faithful service to the state was essentially a condition precedent to any state employee receiving a pension. Since Almeida had failed to serve honorably, he was disqualified from receiving a pension, even though he had otherwise satisfied the statutory requirements for his pension rights to vest. In reaching this outcome, the Court noted its reluctance to place the pension system in any one of the previously discussed categories "because such a limiting categorization might lead to an improper consequence." *Id.*, at 1386.

Though the *Almeida* Court did not expressly anchor the pension system upon the spectrum, the Court did make clear that, as a matter of Rhode Island law, pensions are not gratuities of the state. *Id.*, at 1385 ("Although the pension plan in the present case is noncontributory, we

decline to categorize it as a gratuity of the state."). Rather, the Court noted that "we conclude that a pension comprises elements of both the deferred compensation and contract theories." *Id.*, at 1386. In the context of the *Almeida* opinion, both the "deferred compensation" and "contract" theory are, in fact, theories of implied contract. Indeed, the only difference between the deferred compensation and contract theories is the time at which pension rights vest. According to the contract theory, pensions rights vest upon the start of employment. Under the deferred compensation model, pension rights vest upon the satisfaction of statutory eligibility requirements. Either way, the employee has some contractual rights in receiving a pension.

Therefore, the real question that was avoided by the Rhode Island Supreme Court was not whether the pension system was contractual or gratuitous, but instead *when* participants may assert contractual rights in their pension benefits. Of course, the answer to that question has far-reaching effects, and the Court thus sought to avoid cementing the retirement system into a particular compartment. Yet, notwithstanding the Rhode Island Supreme Court's choice not to categorize the pension system explicitly, this Court concludes that the *Almeida* decision strongly supports the notion that state pensions are implied contracts, though the time at which the contractual rights may be asserted remains unresolved.

In any event, the *Almeida* decision does not control here; it merely provides background. The issue of whether a contract exists between the plaintiffs and the Retirement System under the Contract Clause is a matter of federal law. *Dodge*, 302 U.S. at 78. Rhode Island law need only be consulted in making this determination. *Id.* Moreover, *Almeida* can be distinguished on its facts. The primary distinction is that the pension system in that case was *non-*

contributory.[5] It can also be distinguished because that case concerned the termination of a single person's pension rights for cause, whereas this case concerns the statutory expulsion of a class of persons from the Retirement System who had not been found guilty of wrongdoing.

c. Application of Contract Law

Having established the legal background regarding public pension systems, this Court must now consider whether a contract arose between the plaintiffs and the State when they were allowed into the Retirement System. This Court now holds that an implied in fact contract was created for three reasons. These reasons are ultimately grounded in an assessment of the language and circumstances of the statutes in question.

The first reason is that Section 36-9-33 was an offer to join the Retirement System *voluntarily*. As such, the statute could not be implemented without the affirmative agreement of the plaintiffs. The statute does not allow plaintiffs to exist statically and have a mandatory gift conferred upon them. Rather, they were required to take action, i.e. to persuade their employers and co-workers to vote to adopt the System and to contribute their money, in order to participate. To that extent, the statute did not offer a guaranteed position in the System, nor did it declare a policy.

The second reason that plaintiffs are party to a contract with the System is that Section 36-9-33 (and Chapters 8 through 10 of Title 36) require that plaintiffs *contribute their money* in order to participate in the System. Indeed, the only reason that the plaintiffs gave their money to the Retirement System was to "purchase" pension credits.

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[5] It was the Rhode Island pension system for the Judiciary, not the one at issue in this case.

There was, therefore, a bargained-for exchange, and the terms of the exchange were set by the General Assembly. In the short term, the State received the plaintiffs' money and was able to invest plaintiffs' money as it saw fit, or to use the money to cover current obligations of the pension system. In the long term, plaintiffs' short-term sacrifices were to be repaid in the form of benefits.

The third reason that plaintiffs are party to a contract with the State is that the circumstances surrounding the enactment and implementation of the statute *induced plaintiffs to rely on their secure position within the System.*[6] At the time that the Eviction Act was passed, plaintiffs had been participants in the Retirement System for four years. Some were actually receiving pension benefits. From 1990 to 1994, the System had accepted plaintiffs' money on the same terms that it had for all other participants. The State had treated plaintiffs as full members of the System, calculating their benefits and processing their retirement elections according to the terms of Chapters 8 through 10. In addition, and perhaps most importantly, the State did not appeal the orders of the Superior Court allowing the plaintiffs to join the System. The failure to appeal, at a minimum, suggests acquiescence on the part of the State to plaintiffs' participation in the System. Certainly, the State gave no indication to the plaintiffs that their benefits were not secure. Indeed, the effect of state conduct suggested the opposite. As a result, plaintiffs' alleged reliance was not unreasonable.

The application of traditional contract law principles serves to demonstrate the actual structure and content of the contract between the plaintiffs and the Retirement

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[6] Plaintiffs' allegations of reliance in the Complaint must be accepted as true for purposes of this motion to dismiss.

System. In order for an agreement to be enforceable under contract law, the parties must manifest their objective intent to be bound. *UXB Sand & Gravel, Inc. v. Rosenfeld Concrete Corp.*, 641 A.2d 75, 79 (R.I. 1994) (applying R.I. law). Such intent is manifested through one party's offer and the other party's acceptance of the offer. *Smith v. Boyd*, 553 A.2d 131, 133 (R.I. 1989). When the offeror seeks acceptance though an act of performance on the part of the offeree, the offeror proposes a unilateral contract. *Flanders + Medeiros, Inc. v. Bogosian*, 868 F. Supp. 412 (D.R.I. 1994). A unilateral contract consists of a promise made by one party in exchange for the performance of another party, and the promisor becomes bound in contract when the promisee performs the bargained for act. *B & D Appraisals v. Gaudette Machinery Movers, Inc.*, 733 F. Supp. 505, 508 (D.R.I. 1990).

Section 36-9-33 functioned as an offer. The *Restatement* defines an offer as a "manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." *Restatement (Second) of Contracts*, § 24 (hereinafter *Restatement*). Clearly, that is an apt description of § 36-9-33. The State induced plaintiffs to contribute money to the System in order to receive benefits in the future. The State would benefit in the short term by receiving plaintiffs' contributions. This statute expresses a clear indication by the State that plaintiffs should be allowed to enter the Retirement System, so long as plaintiffs agreed to the State's terms. *See In re Newport Plaza Associates, L.P.*, 985 F.2d 640 (1st Cir. 1993).

The status of public pension system law at the time when Section 36-9-33 was passed is, to some extent, probative of the legislative intent behind its enactment. By 1987, the argument that pensions were a gratuity of the

state had long since fallen from favor. *See, e.g.*, Note, Public Employee Pensions in Times of Fiscal Distress, 90 Harv. L. Rev. 992, 994-98 (1977) (reflecting that *Pennie v. Reis* and the gratuity approach had been widely criticized by 1977). By enacting a statute in 1987 which allowed plaintiffs to voluntarily join and thereafter contribute to the Retirement System, the General Assembly extended, according to the prevailing view of public pension systems, a statutory offer. Although Rhode Island did not itself weigh in on this question until the *Almeida* opinion was issued in 1992, the legal groundwork suggesting that pension systems were contractual was already established throughout the country.

Defendants argue that there was no legislative intent to make an offer or to form a contract through Section 36-9-33, since "most of the legislators who voted on the bill [were] ignorant as to the legislation's basic terms and provisions." Defendant Mayer's Memorandum of Law, at 4-5 (also quoting various legislators who claim that most of the legislators did not know the effect of Section 36-9-33). This argument clearly fails. Whether or not every legislator who voted for passage of this statute understood its terms is not an issue. Rather, it is the intent of those persons who drafted the statute—as expressed through the language of the statute—that is imputed to all of the legislators that voted for it. Since those legislators offered plaintiffs the opportunity to voluntarily participate in and contribute to the Retirement System, their legislation constituted an offer.

That the Retirement Board did not appeal either order of the Superior Court allowing the plaintiffs into the System is further evidence of the fact that § 36-9-33 was an offer. Had the Retirement Board not meant to be bound contractually, it could have appealed those orders to the

Rhode Island Supreme Court.[7] However, the Retirement Board took no such action. The Board's inertia resulted in the finality of the orders of the Superior Court allowing the plaintiffs to join the System. In addition, the legislature did not act promptly to reverse the effects of the Superior Court orders by clearly making the Repeal Statute retroactive and preventing the plaintiffs from entering into the System. This illustrates graphically that the General Assembly intended § 36-9-33 to be an offer to plaintiffs to create a contract.

The individual plaintiffs accepted the statutory offer by taking the actions that the statute required in order to participate in the System. The *Restatement* states that "[a]cceptance by performance requires that at least part of what the offer requests be performed or tendered and

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[7] It is probable that the Rhode Island Supreme Court would have interpreted the Repeal Statute to apply *retroactively*, and it is probable that the Court would have found it to be constitutional in light of *Brennan v. Kirby*, 529 A.2d 633 (R.I. 1987). In that case, the Rhode Island Supreme Court considered the question of whether the retroactive repeal of a state statute conferring enhanced seniority in employment upon veterans was unconstitutional. In finding that the statute did not violate due process, the Court noted that "[i]n this particular case, the degree of unfairness to plaintiffs is negligible because they never *relied upon [the seniority statute] when they applied for and accepted employment. And there is no evidence to suggest that they would have foregone municipal employment had they been aware that no seniority benefits would have been credited.*" *Id.* at 640-41 (emphasis added). Since the plaintiffs in this case could not have reasonably relied on the benefits promised by § 36-9-33 at the time that the Repeal Statute was passed, they could not have brought a successful constitutional challenge to the Repeal Statute. It is only because the Eviction Act came four years after the orders of the Superior Court were final—a time during which plaintiffs had participated in the Retirement System on equal footing with all other participants—that their reliance was reasonable. And it is that reliance, coupled with their voluntary participation and contributions to the System, that distinguish them from the plaintiffs in *Brennan*.

includes acceptance by a performance which operates as a return promise." *Restatement*, § 50. In this case, the plaintiffs did exactly what the statute required. The employers voted to participate in the System, the individual plaintiffs chose not to opt out of the System, and the employers and the individual plaintiffs contributed to the System at the rate that the statute required. The offer was accepted on the terms that it proposed. Thus, a meeting of the minds was accomplished.

The Repeal Statute was the revocation of the offer. The *Restatement* states that "where an offer is made by advertisement in a . . . general notification to the public . . ., the offeree's power of acceptance is terminated when a notice of termination is given publicity by advertisement or other general notification equal to that given to the offer and no better means of notification is reasonably available." *Restatement*, § 46. Since Section 36-9-33 was repealed in the same manner that it was created (by legislative act), the revocation was effective. It was the Superior Court that determined as a matter of statutory interpretation that this revocation did not apply to the plaintiffs. As a matter of contract law, since the revocation occurred after plaintiffs' acceptance of the offer, the revocation was not effective as to plaintiffs. *See Merritt Land Corp. v. Marcello*, 110 R.I. 166, 291 A.2d 263 (1972).

Finally, the agreement between the State and the plaintiffs is supported by consideration. Contracts implied in fact require consideration as express contracts do. *Hayes v. Plantations Steel Co.*, 438 A.2d 1091, 1094 (1982). Rhode Island law, which reflects the majority position, says that "consideration consists either in some right, interest or benefit accruing to one party or some forbearance, detriment or responsibility given, suffered of undertaken by the other." *Id.* (citing *Dockery v. Greenfield*,

86 R.I. 464, 136 A.2d 682 (1957); *Darcey v. Darcey*, 29 R.I. 384, 71 A. 595 (1909)).

Section 36-9-33 actually raises two different questions regarding consideration. The two different questions arise from two different subsections of that statute. The first subsection, 36-9-33(a), which allows prospective participation in the System, requires that contributions be taken from the employees' salaries. For prospective participation, then, this voluntary contribution from plaintiffs' paychecks was intended to be the consideration. *See Bender v. Anglin*, 207 Ga. 108, 60 S.E.2d 756 (1950). The plaintiffs were to pay presently to receive retirement credits, and the retirement credits could be cashed in for benefits in the future. The second subsection, 36-9-33(b), raises a more complex question of consideration. Subsection 36-9-33(b) allowed union members who were opting into the Retirement System under the terms of Subsection (a) to purchase retirement credits in the System for time that they had spent employed by the unions or by out-of-state school systems. The State allowed the plaintiffs to purchase the credits at a price equal to ten percent (10%) of the employee's first year's earnings as a full-time employee multiplied by the number of years, or any fraction thereof, that the employee had worked. Defendants have urged this Court to find that plaintiffs' purchase of past credits did not amount to a contract with the state. Defendants' principal argument is that because plaintiffs were given the option to purchase the credits at an allegedly "discounted" rate, the Court should find that no contract exists.

Defendants' argument fails for two reasons on this motion to dismiss. First, the argument requires this Court to assume facts in favor of the defendants, i.e. that the rate at which plaintiffs purchased the past credits was a

"discounted" rate . Obviously, a court cannot assume facts in favor of a defendant on a motion to dismiss.

Defendants' argument also fails as a matter of law. In analyzing whether or not a contract *exists*, this Court need not consider the adequacy or consideration. *Restatement*, § 79. The mere existence of some bargained-for exchange is enough to support a contractual relationship. And where, as here, there is a direct exchange of money for retirement credits, there is a clear bargained-for exchange. Moreover, it was the State itself who set the terms of that bargain. At this point, however, this Court offers one clarification: whether or not that contract *exists* is an entirely different question from whether a contract is *enforceable*. Defendants' arguments regarding the adequacy of consideration go to the latter question, though the merits of that question cannot be decided at this point, since all facts on a motion to dismiss must be decided in favor of the plaintiffs.

The consideration that flowed between the plaintiffs and the State proves that plaintiffs have not been extended a mere gratuity by the State. Persons who received a gratuity have no right to bring a claim under the Contract Clause, regardless of whether they have taken actions in reliance on the gratuitous statute or not. It is plaintiffs' contributions to, participation in and interactions with the System that distinguish them from the plaintiffs in *Hoffman v. City of Warwick*, 909 F.2d 608 (1st Cir. 1990). In that case, the First Circuit considered the constitutionality of the retroactive repeal by the Rhode Island General Assembly of a 1945 statute providing for enhanced seniority in employment for returning war veterans. The named plaintiffs in *Hoffman* were two veterans who were employed by Rhode Island municipalities. Those plaintiffs had been unaware of the seniority statute when they applied for and accepted employment with the

municipalities, and the municipalities had not granted plaintiffs' seniority credit for the time they had spent in the military. However, when the plaintiffs became aware of the statute in 1984, they requested the enhanced seniority. Before the seniority was conferred, the Rhode Island General Assembly repealed the statute in 1985. Upon the repeal, plaintiffs brought suit, claiming that the legislature had interfered with their employment contracts, thereby violating the Contract Clause, the Equal Protection Clause, and the Due Process Clause of the United States Constitution. Judge Torres, of this Court, dismissed the complaint for failure to state a claim by relying on this writer's opinion in *West v. Town of Bristol*, 712 F. Supp. 269 (D.R.I. 1989). The First Circuit affirmed the dismissal.

In analyzing the plaintiffs' Contract Clause claim, the First Circuit noted that the Contract Clause is "applicable to *contracts* into which a state enters, but normally state statutory enactments do not of their own force create a contract with those who the statute benefits." 909 F.2d at 614 (emphasis in original) (citations omitted). The Court found that the goal of the repealed statute—enhancing the employment status of veterans—was a unilateral "entitlement[] analogous to welfare and other governmental benefits," and not an offer and acceptance that would lead to enforceable contract rights. *Id.* The Court also noted that the circumstances surrounding the statute did not suggest a "legislative intent to create private contractual rights." *Id.* Accordingly, since the statute did not constitute a contract, the Court held that plaintiffs' Contract Clause claim must fail as a matter of law.

There are two basic differences between the *Hoffman* case and this case. First, the plaintiffs in *Hoffman* gave no consideration to realize the benefits of the statute they sought to enforce. Their simple statutory receipt of en-

hanced employment status is therefore a gratuity. It was an award of merit, a gesture of thanks by the state, and the group to receive the award needed to perform no sacrifice to realize it. The statutory offer in this case is different. It allowed plaintiffs to voluntarily contribute money to the state, and, in exchange, the State would make them part of the System. Plaintiffs had to sacrifice money in the short term in exchange for benefits to be paid in the long term. The State observed this System for four years, giving the plaintiffs credit in the System, while accepting their money and using it for the purposes that the State saw fit. The statute, therefore, does not confer a gratuity upon plaintiffs.

The second difference is that the plaintiffs in *Hoffman* were suing to enforce their *expectations* of receiving a statutory benefit while plaintiffs in this case are recipients of statutory benefits, seeking to prevent the State from taking those benefits away. The Eviction Act was passed four years after the plaintiffs' participation in the Retirement System had been sealed with judicial imprimatur. *See Rhode Island Federation of Teachers v. Employees Retirement System of Rhode Island*, Order, December 11, 1989. As four-year participants in the Retirement System, both the individual plaintiffs and their employers had contributed to the System and had relied on the benefits guaranteed by the System in making substantial life plans and changes. In *Hoffman*, on the other hand, plaintiffs had never received any benefit, nor any indication that they were party to a contract. They had never paid money for a benefit, had alleged no reliance on the benefit (except to request it), and had not been promised the benefit from their employers. Those plaintiffs simply had no Contract Clause claim against the state, as they were not party to any contract, express or implied.

If there was any gratuity in this case, it was the State's offer to the plaintiffs *to join* the System. However, plaintiffs have not brought suit under the Contract Clause alleging that they have a *contractual right to join* the Retirement System.[8] Were that the case, plaintiffs would have filed suit to challenge the *Repeal Act*, which extinguished § 36-9-33. Instead, plaintiffs' constitutional challenge poses an entirely different question, one that arises out of the enactment of the *Eviction Act*, § 36-9.1-2. The question is whether, once plaintiffs have been part of a voluntary, contributory Retirement System for four years, they are party to a contract with the State.[9] This Court reiterates that for purposes of federal constitutional law they are parties to a contract.

It is clear that plaintiffs would have failed to prove a contract between themselves and the State if they had brought a Contract Clause challenge to the Repeal Statute in 1989. At that point, plantiffs would have been similarly situated to the plaintiffs in *Hoffman*: both would have sought enforcement of a statute that had not been implemented. However, unlike the trial court in *Hoffman*, the Rhode Island Superior Court decided that, as a matter of statutory interpretation (and not Contract Clause

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[8] In other words, plaintiffs are *not* arguing that the Contract Clause requires that 36-9-33 be enforced. Plaintiffs instead ask that 36-9.1-2, the Eviction Act, not be enforced.

[9] If this Court were to hold that the Retirement System statutes did *not* amount to a contract between the participants and the State, then the General Assembly could, at any time, make any unilateral modification to the System without constitutional recourse. In other words, the Constitution could not prevent the General Assembly from evicting classes of employees from the System or from reducing or even eliminating benefits. This would be due to the fact that the pension system would necessarily be a gratuity. Such a holding would be clearly incompatible with the Retirement System's purpose and the intent of the General Assembly in enacting it.

interpretation), plaintiffs were to be made part of the Retirement System. When plaintiffs' participation in the System was determined as a matter of law, the foundation for a contract between the plaintiffs and the Retirement System was laid. Plaintiffs became parties to a contract with the Retirement System when money started to be withheld from their paychecks and the State conferred upon them service credits in the System.

Defendants have also argued that since plaintiffs are not party to an employment contract with the State, and that since a pension arises out of a contract of employment, plaintiffs cannot be deemed to be parties to a contract with the State. This Court, however, cannot observe this distinction. The General Assembly, in its wisdom (or lack thereof), chose to enact § 36-9-33, and thus recognized that certain public union employees deserved to be part of the State Retirement System. The legislature therefore stated that, at least with respect to pension benefits, there was no difference between being employed for the State and being employed by organizations that represent state employees for purposes of collective bargaining. The effect of the statute was to treat the unions like the State, i.e., to require them to contribute to a voluntary retirement plan at exactly the same rate as any local education agency did for its certified teachers. In addition, there is another reason that defendants' distinction fails. In this case, where the plaintiffs had to choose to enter the Retirement System and had to contribute their money to do so, their contract with the State exists outside of the contract of employment. It is not a contractual aspect of the employment contract itself.

It is because plaintiffs voluntarily opted into the System, contributed to it, participated in it for four years, and made decisions about their lives in response to their

settled relationship, that the plaintiffs and the Retirement System are parties to an implied contract. In summary, defendants' argument that there is no contract between the plaintiffs and the state in this case because plaintiffs are not state employees, is totally without relevance.

It is not necessary to hold that the contract that has been formed between the plaintiffs and the Retirement System should be understood as a fluid or flexible arrangement. To that extent, this holding is unlike that of the Supreme Judicial Court of Massachusetts in *Opinion of the Justices*, 303 N.E.2d 320 (Mass. 1973). In that case, the Court held that the direct statutory contract between the state and its employees "should be understood here in a special, somewhat relaxed sense." *Id.* at 327. The Court noted that the contract model is "best understood as meaning that the retirement scheme has generated material expectations on the part of employees and those expectations should in substance be respected." *Id.* at 328. However, by allowing the contract to be understood in a "special, somewhat relaxed sense," the Court allowed the legislature to make reasonable modifications to the system without creating a breach of contract cause of action on behalf of the participants. By reading flexibility into the "contract," the Court clearly sought to protect the interests of the employees in receiving a pension, while simultaneously allowing the legislature to make changes to the system that were fair and reasonable.

The same problem, however, does not present itself in this case, as plaintiffs have brought suit under the Contract Clause. By holding that the plaintiffs are party to a contract with the Retirement System as a matter of federal constitutional law, this Court does not prevent the General Assembly from making changes to the laws implementing the pension system. On the contrary, this Court is compelled to permit the General Assembly to

make modifications to the Retirement System contract, so long as those modifications are "reasonable and necessary to serve an important governmental interest." *United States Trust*, 431 U.S. at 25. Thus, unlike a breach of contract cause of action which prevents any unilateral modification to a contract, the Contract Clause merely requires that contractual modifications to the pension system pass the constitutional test of intermediate scrutiny.

2. Whether Plaintiffs' Contractual Rights Have Been Substantially Impaired

Since the Court has concluded that plaintiffs were party to a contract with the Retirement System, the next question which arises is whether the Eviction Act substantially impairs the contractual relationship between the individual plaintiffs and the System. *Energy Reserves Group*, 459 U.S. at 411. The impairment need not result in a "total destruction" of the employees' contract rights to be considered substantial. *United States Trust*, 431 U.S. at 26.

Obviously, the Eviction Act substantially impairs plaintiffs' contract with the Retirement System. The Act totally extinguishes all of the retirement benefits that the individual plaintiffs acquired pursuant to § 36-9-33 and upon which they have relied for four years. Indeed, the Eviction Act contemplates the paradigm of "substantial impairment." Many other courts have considered far less significant impairments to be considered substantial. *Nevada Employees Assoc., Inc. v. Keating*, 903 F.2d 1223, 1227 (9th Cir.), *cert. denied*, 498 U.S. 999, 111 S. Ct. 558, 112 L.Ed.2d 565 (1990) ("substantial impairment" when the state changes its retirement system from one where employees could withdraw their contributions at any time to one where employees exercising early withdrawal would have to pay a penalty); *Association of*

Surrogates v. State of New York, 940 F.2d 766 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 936 (1992) ("substantial impairment" when the state delays the payment of ten days salary to certain state employees during a fiscal crisis and promised to pay salary at later date). Therefore, this Court opines that the Eviction Act substantially impairs plaintiffs' implied contract with the State as a matter of law.

3. Reasonable and Necessary to Serve an Important Public Purpose

The third and final question that this Court must consider in an analysis under the Contract Clause is whether the substantial impairment of plaintiffs' contractual rights is "reasonable and necessary to serve an important public interest." *United States Trust*, 431 U.S. at 25. Defendants' motion to dismiss alleges that this determination can be made as a matter of law. Defendants make three points to show that the statute is both reasonable and necessary: (1) preserving the Retirement System for the sole benefit of the public employees for whom the System was established; (2) correcting the unfairness inherent in the payment of grossly disproportionate rates of return and a windfall benefit of almost $10 million to the plaintiffs; and (3) avoiding severe economic penalties to the Retirement System and its members by preventing loss of the Retirement System's crucial tax-exempt status as a qualified government plan. Defendants have relied on the "Findings" section of the Eviction Act as the foundation for these proffers.

It is clear that when this Court considers whether an enactment is constitutional, or, more specifically, "whether an act serves a public purpose, the self-serving recitation of a public purpose contained within the legislation is not conclusive." *In re Advisory Opinions of the Governor*

(DEPCO), 593 A.2d 943, 947 (R.I. 1991). Of course, great deference should be given to a public purpose articulated by the legislature, as the legislature "is vested with wide discretion to determine the existence of a public purpose. . . ." *Id.* As a result, this Court acknowledges the legislature's justifications for the Eviction Act. However, this Court is not bound to accept these determinations, especially on a motion to dismiss. Rather, this Court must examine plaintiffs' Complaint to determine whether plaintiffs have articulated a compensable claim as a matter of law.

Plaintiffs have sufficiently alleged that the Eviction Act is neither reasonable nor necessary to serve an important public purpose. Complaint, ¶ 23. Plaintiffs have essentially alleged that the Eviction Act was an illegitimate exercise of the state's police power because there were less intrusive ways to effect the statute's goals. On a motion to dismiss, those allegations must be accepted as provable. In any event, defendants' three justifications can be summarily disposed of at this point. The first justification—that the system should be preserved for the persons for whom it was created—is simply a conclusory description of the goal of this legislation and fails to articulate an important public purpose, especially in light of the impact that the legislation has on the plaintiffs. The second justification—that the statute is unfairly beneficial to the plaintiffs—is fraught with questions of fact, and such questions are inappropriately decided at this point.[10] The third justification—that the System will lose its status as a qualified government plan under ERISA—does raise an important public interest. However, this justification cannot be accepted at this juncture. It is by no means clear

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[10] One such question is whether plaintiffs were allowed to purchase credits in the System at an actuarially sound rate, and, if not, who allowed them to do so.

that the Eviction Act is both reasonable and necessary to avoid the loss of qualified government plan status. Both sides have articulated reasons why the System may or may not retain its tax-exempt status. Since, at this point, all doubts are to be resolved in favor of the plaintiffs, defendants' argument fails. Moreover, to some extent, defendants' argument seems disingenuous. Rhode Island has a history of collaborating with the federal government to compromise on federal regulation of its pension systems. A perfect example is the negotiations that have occurred regarding the pensions for state legislators. Furthermore, neither at the time that the Repeal Statute was passed nor at the time that the Superior Court ruled that plaintiffs had to be participants in the System, did the Retirement Board voice concern that § 36-9-33 might have adverse tax consequences. In fact, quite shockingly, the Retirement Board *did not even appeal the ruling of the Superior Court that held that plaintiffs were rightful participants in the Retirement System*. Finally, during the four years that plaintiffs have been part of the Retirement System, no attempt has been made by the federal government to withdraw the plan's tax-exempt status. At this point, therefore, this Court refuses to blindly accept defendants' assertion that the plan will lose its tax-exempt status because of plaintiffs' participation in the system. It is pure speculation at best.

This Court also notes that defendants' second justification may play a significant role in this case. Understood broadly, that justification—that the statute is unfairly beneficial to the plaintiffs—implicates the fiscal health of the System. Though the question of the health of the System is undoubtedly a question of fact inappropriately resolved on a motion to dismiss, this Court notes that the Supreme Court has held that states may suspend contractual obligations during an economic crisis. *Home Building*

& Loan Ass'n v. Blaisdell, 290 U.S. 398, 54 S. Ct. 231, 78 L.Ed. 413 (1934). An overall assessment of whether the statute is "reasonable and necessary to serve an important public interest" will therefore balance the substantial impairment of plaintiffs' contract, the existence of an "important general social problem," and the existence of an emergency. *Allied Structural Steel v. Spannaus*, 438 U.S. 234, 94 S. Ct. 2716, 57 L.Ed.2d 727 (1978).

The determinations that defendants seek to have the Court make on this motion are simply premature. Currently, this Court has conflicting information before it, the substance of which is relevant to the determination of whether this statute is reasonable and necessary. On a motion to dismiss, this Court need not weigh this conflicting information. Rather, the Court must accept what the plaintiffs have stated in their Complaint, and plaintiffs have sufficiently alleged that the Eviction Act is not reasonable and necessary to serve a compelling state purpose. The motions to dismiss the first cause of action in the Complaint, therefore, are denied.

B. Due Process Claim

The second cause of action stated in plaintiffs' Complaint proceeds under the Due Process Clause of the Fourteenth Amendment and 42 U.S.C. § 1983. In this count, plaintiffs allege that their retirement benefits were property interests that are entitled to protection from arbitrary state action. The Eviction Act, in plaintiffs' view, denied plaintiffs' due process of law by retroactively depriving them of this property interest. Plaintiffs also allege that they have, in the past, taken both professional and financial actions in reliance on the expected benefits and that there is no legitimate state interest to support the denial

of their benefits. These allegations amount to a substantive due process claim.[11]

Defendants' motions to dismiss challenge the validity of plaintiffs' claims as a matter of law. Defendants offer two arguments to support their motion. First, defendants claim that each plaintiffs' interest in the retirement benefits is not an entitlement, but rather a gratuity. If the retirement benefits are a gratuity, then plaintiffs may not claim substantive due process protections when that gratuity is taken from them. Second, defendants argue that the Eviction Act had a legitimate purpose as a matter of law. To demonstrate the legitimate purpose of defendants offer the same justifications that were used to support their argument that the statute was reasonable and necessary to serve an important public interest under the Contract Clause. Defendants also contend that the retroactivity of the Eviction Act was necessary to effectuate its legitimate goals.

Defendants' first argument fails, for it is clear that plaintiffs in this case have a property interest in their retirement benefits. As this Court stated in *West v. Town of Bristol*, 712 F. Supp. 269 (D.R.I. 1989) (citations omitted), "[t]he predicate to a property interest is a legitimate claim of entitlement under state law. . . . Denial of such an entitlement in turn creates the basis for a property-interest due process claim." Plaintiffs clearly have a property interest in their retirement benefits for two reasons. First, as this Court has determined, plaintiffs have a contractual relationship with the State. Undoubtedly, contractual rights are property interests under the due

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[11] In other words, plaintiffs do not argue that the taking of their pension rights was procedurally deficient. Rather, they argue that, regardless of the procedure employed by the legislature, the very act of taking itself was an improper exercise of governmental power.

process clause. *Arnett v. Kennedy*, 416 U.S. 134, 94 S. Ct. 1633, 40 L.Ed.2d 15 (1974); *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011, 25 L.Ed.2d 287 (1970). Second, even if it was determined that plaintiffs were not party to a contract with the Retirement System, it is clear that plaintiffs would still have a property interest in their retirement benefits.

In order to prove a property interest, plaintiffs must have "alleged a tangible interest in [their pension benefits] sufficient to invoke the general constitutional protection against arbitrary and irrational government action." *Hoffman*, 909 F.2d at 618. Plaintiffs have done so in this case. Plaintiffs' reasonable expectation of receiving a pension benefit clearly meets this test. *Id.*, at 618 (citing *Fleming v. Nestor*, 363 U.S. 603, 610-11, 80 S. Ct. 1367, 1372-73, 4 L.Ed.2d 1435 (1960) (Although an employee's interest in benefits under the Social Security Act does not rise to the level of an "accrued property right," "[t]he interest of a covered employee under the Act is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause.")).

Defendants' second argument is that plaintiffs' substantive due process claim should be dismissed because the Eviction Act has both a legitimate legislative purpose and a reasonable mechanism for achieving that purpose as a matter of law. For support, defendants rely on the same arguments that they offered to show that the Eviction Act could pass constitutional muster under the Contract Clause, namely, that the Eviction Act (1) preserves the Retirement System for the sole benefit of the public employees for whom the System was established; (2) corrects the unfairness inherent in the payment of grossly disproportionate rates of return and a windfall benefit of almost $10 million to the plaintiffs; and (3) avoids severe

economic penalties to the Retirement System and its members by preventing loss of the Retirement System's critical tax-exempt status as a qualified governmental plan. Defendants also argue that these legitimate interests cannot be achieved unless plaintiffs' retirement credits are retroactively extinguished.

The test for the constitutionality of retroactive legislation was articulated by the Supreme Court in *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 104 S. Ct. 2709, 81 L.Ed.2d 601 (1984). In that case, the Supreme Court held that retroactive legislation is constitutional so long as the legislation effects a legitimate legislative purpose furthered by a rational means. *Id.* at 730. *See Lieberman-Sack v. Harvard Community Health Plan of New England*, 882 F. Supp. 249 (D.R.I. 1995). Thus, while "[t]he retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process," *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17, 96 S. Ct. 2882, 2893, 49 L.Ed.2d 752 (1976), "that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose." *United States v. Carlton*, —— U.S. ——, 114 S. Ct. 2018, 2022, 129 L.Ed.2d 22 (1994). Furthermore, though "[r]etroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions," *General Motors Corp. v. Romein*, 503 U.S. 181, 190-92, 112 S. Ct. 1105, 1112, 117 L.Ed.2d 328 (1992), it is "clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations." *Pension Benefit Guaranty*, 467 U.S. at 730 (citations omitted).

Defendants' three asserted justifications do not carry the day here and now. Each of the justifications offered by

the defendants was rejected by this Court under its Contract Clause analysis: the first, because it is conclusory and illegitimate; the second and third, because they require that facts be assumed in favor of the defendants. Therefore, none of the arguments advanced by the defendants can establish at this juncture that the Eviction Act has a legitimate purpose as a matter of law.

Since plaintiffs have a property interest in their pension benefits, and since defendants have failed to articulate a legitimate purpose for the Eviction Act as a matter of law, defendants' motions to dismiss the second cause of action in the Complaint are denied.

C. Takings Clause

The third cause of action stated in plaintiffs' Complaint proceeds under the Takings Clause of the Fifth Amendment, applicable to the states through the Fourteenth Amendment and 42 U.S.C. § 1983. In this court, plaintiffs allege that the Eviction Act amounts to a taking of their property rights, i.e., their contractual rights with the Retirement System, without just compensation. Defendants' motions to dismiss challenge the legal sufficiency of this claim.

The Takings Clause provides that "private property" shall not "be taken for public use without just compensation." U.S. Const. amend. V. This clause, which is applicable to the states through the Fourteenth Amendment, *see, e.g., Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160, 101 S. Ct. 446, 450, 66 L.Ed.2d 358 (1980), protects individuals from economic disadvantage when their property is taken by governmental action.

The question that the parties significantly dispute is whether or not plaintiffs' interests in their retirement benefits constitute private property, that is, property that is

capable of being "taken." However, now that this Court has determined that plaintiffs had a contractual right to receive their benefits, this question may be disposed of summarily. It is clear that contract rights are protected by the Takings Clause. *Rickelshaus v. Monsanto Co.*, 467 U.S. 986, 1003, 104 S. Ct. 2862, 2873, 81 L.Ed.2d 815 (1984); *United States Trust*, 431 U.S. at 19 n.16 ("[c]ontract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid."); *Contributiors to Pennsylvania Hospital v. City of Philadelphia*, 245 U.S. 20, 38 S. Ct. 35, 62 L.Ed. 124 (1917) (same).

Once it is established that the Section 36-9-33 retirement benefits constitute property, it is necessary to determine whether the Eviction Act constitutes a taking of that property without just compensation. In evaluating Takings Clause challenges, the Supreme Court has identified three factors as being of "particular significance:" "(i) 'the economic impact of the [statute] on the claimant'; (ii) 'the extent to which the [statute] has interfered with distinct investment-backed expectations'; and (iii) 'the character of the governmental action.'" *Bowen v. Gilliard*, 483 U.S. 587, 606, 107 S. Ct. 3008, 97 L.Ed.2d 485 (1987) (quoting *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124, 98 S. Ct. 2646, 57 L.Ed.2d 631 (1978)). Considering each of these factors, it is clear that plaintiffs have sufficiently alleged a compensable taking in this case.

First, the Eviction Act's economic impact is severe. Though plaintiffs would have received the actual amount of their contributions plus interest upon expulsion from the System, plaintiffs have sufficiently alleged that this amount does not comport with the amount that plaintiffs expected to receive when they took actions in reliance on

being part of the Retirement System. The Eviction Act would have ousted plaintiffs after four years of participation in the System, a time during which plaintiffs declined other opportunities and changed their life plans. Those factual allegations are sufficient to show severity for purposes of a motion to dismiss.

Second, the Eviction Act interferes with plaintiffs' investment-backed expectations. The individual plaintiffs made large contributions to the Retirement System both to purchase past credits and to participate in the System in the future. Plaintiffs have clearly alleged that these contributions were made with the expectation of receiving benefits in the future. Since plaintiffs expected to receive those benefits, their allegations are sufficient to show adequate interference with their investment-backed expectations and, therefore, survive defendants' motions.

Third, plaintiffs have sufficiently alleged that the nature of the government's action in this case is intrusive enough to be considered a taking. Plaintiffs state that because the Eviction Act extinguished all of the retirement credits that plaintiffs accrued, that the State's action terminates all interest that the plaintiffs might have in the subject matter. Clearly, by removing plaintiffs from the System, they can no longer request their retirement credits; their rights have been abolished.

Plaintiffs have also sufficiently alleged that the Eviction Act does not provide just compensation for what has been taken from them. While an actual determination of whether the statute actually provides just compensation to the plantiffs is a fact-bound inquiry improperly resolved at this point, it is clear that, when the facts are assumed in plaintiffs' favor, they have alleged inadequate compensation. This is shown directly, since the alleged value of the extinguished retirement benefits is greater

that the amount of money that would be returned to the plaintiffs by the statute. As a result, defendants' motions to dismiss the third cause of action are denied.

IV. Conclusion

For the foregoing reasons, defendants' motions to dismiss the three causes of action asserted in plaintiffs' Complaint are denied.

It is so ordered.

/s/ Ronald R. Lagueux
RONALD R. LAGUEUX
Chief Judge

July 7, 1995

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 98-1763

NATIONAL EDUCATION ASSOCIATION, RHODE ISLAND, BY ITS SECRETARY, TIA SCIGULINSKY, *et al*,
Plaintiffs-Appellees,

v.

RETIREMENT BOARD OF THE EMPLOYEES' RETIREMENT SYSTEM, ETC., *et al*,
Defendants-Appellees.

RICHARD R. DEORSEY,
Plaintiff-Appellant.

No. 98-1782

NATIONAL EDUCATION ASSOCIATION RHODE ISLAND, BY ITS SECRETARY, TIA SCIGULINSKY, *et al*,
Plaintiffs-Appellees,

v.

THE RHODE ISLAND RETIREMENT BOARD, *et al*,
Defendants-Appellants.

Order Of The Court
Entered: May 5, 1999

Upon consideration of motion of appellees,

It is hereby ordered that the petition for rehearing and rehearing en banc is denied.

By the Court:

PHOEBE D. MORSE
Clerk

By /s/ Janice M. O'Neil
Chief Deputy Clerk

APPENDIX F

CHAPTER 613

87-H 6336 am
Effective Without the Governor's Signature
Jul. 3, 1987.

AN ACT RELATING TO THE STATE RETIREMENT SYSTEM

It is enacted by the General Assembly as follows:

SECTION 1. CHAPTER 36-9 OF THE GENERAL LAWS ENTITLED "RETIREMENT SYSTEM—MEMBERSHIP AND SERVICE CREDITS" IS HEREBY AMENDED BY ADDING THERETO THE FOLLOWING SECTION:

36-9-33. Employees of organizations representing employees of state and/or municipal subdivisions—Purchase of service credit.—(a) The provisions of chapters 8 through 10 of this title, inclusive, shall apply to full-time employees or organizations representing employees of the state and/or any political subdivision thereof for the purposes of collective bargaining; provided, that any such organization must elect to be covered by the provisions of chapters 8 through 10 of this title by forwarding a certified vote of the organization's appropriate authority to the retirement board not later than December 31, 1988; and provided further, that participation shall begin not later than July 1, 1989. The organization's contribution shall be at the same rate as the contribution of a local education agency for certified teachers. All employees in service as of the date of said certified vote shall become members unless they notify the retirement board, in writing, within sixty (60) days from the date of said certified vote, that they do not wish to become members.

(b) Any members of the state employees retirement system or any full-time employee of an organization representing employees of the state and/or any political subdivision thereof for the purposes of collective bargaining, who has prior hereto been a full-time employee of such an organization or who has been employed by any public school district in-state or out-of-state, may purchase credit for such employment. The cost to purchase said credits shall be ten percent (10%) of the employee's first year's earnings as a full time employee of such an organization multiplied by the number of years, and any fraction thereof, of such employment. Provided further, that any such employee who was on official leave of absence from such organization shall be eligible to purchase credits as hereinbefore provided for the period of such leave of absence.

SECTION 2. This act shall take effect upon passage.

APPENDIX G

CHAPTER 486

88-H 9946
Approved Jun. 9, 1988.

AN ACT RELATING TO THE STATE RETIREMENT SYSTEM

It is enacted by the General Assembly as follows:

SECTION 1. Section 36-9-33 of the General Laws in Chapter 36-9 entitled "Retirement System—Membership and Service Credits," as enacted by chapter 613 of the public laws of 1987 is hereby repealed in its entirety.

SECTION 2. This act shall take effect upon passage.

APPENDIX H

CHAPTER 9.1

RESTRICTING MEMBERSHIP IN RETIREMENT SYSTEM TO TEACHERS AND STATE EMPLOYEES

36-9.1-1. Findings.—The General Assembly hereby finds the following: The grant of the opportunity to an individual to purchase, pursuant to Chapter 613 of The Public Laws of 1987, as codified in § 36-9-33 (repealed by PL 88-486), (hereinafter "§ 36-9-33, repealed"), credit in, and/or to become a member of the Retirement Systems established under chapter 16 of Title 16, chapter 21 of title 45, and/or chapters 8-10, inclusive of this title ("Retirement Systems") bears no rational relationship to any legitimate governmental purpose. The continued accrual of benefits by the beneficiaries of § 36-9-33 (repealed) and the continued payment of monies under § 36-9-33 (repealed) will cause an invasion of the corpus of the Retirement Systems funds in abrogation of those sections of the Internal Revenue Code of 1986 as amended from time to time which apply to governmental plans (including but not limited to 401(a) and 401(f)), and does not further the purposes behind the Retirement Systems.

36-9.1-2. Status of non-employee and non-teacher members.—(a) Any individual who became a member of the Retirement Systems based solely on § 36-9-33 (repealed), or who purchased credit in the Retirement Systems based upon § 36-9-33 (repealed), shall no longer be entitled to such membership and/or such credit(s) and shall no longer receive any benefits of any type from said Retirement Systems which was based upon § 36-9-33 (repealed). By January 1, 1995, the Retirement System shall return any contributions or purchases made pursuant

to § 36-9-33 (repealed), by said individual and/or said individual's employer, with interest at the actuarially assumed rate earned by the Retirement Systems on its pension funds during the applicable time period since such contributions and/or purchase was made.

(b) Said return of such contributions or purchases shall be offset by any benefits already reecived by said individual from the retirement system.

(c) Nothing in this chapter shall be construed as prohibiting any individual from later becoming a member of the Retirement Systems or purchasing credits, in accordance with applicable law.

SUPREME COURT, U.S.
FILED
AUG 31 1999
OFFICE OF THE CLERK

No. 99-215

In The

Supreme Court of the United States

DIANA CASEY, et al.,

Petitioners,

v.

RETIREMENT BOARD OF THE RHODE ISLAND EMPLOYEES' RETIREMENT SYSTEM, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the First Circuit properly decided Petitioners' Contract Clause challenge to their eviction from the Employees' Retirement System of the State of Rhode Island, on a claim grounded not on years of public service, but based only on private union employment.

PARTIES

Paul J. Tavares succeeded Nancy J. Mayer as General Treasurer of the State of Rhode Island and Chairperson of the Retirement Board on January 5, 1999. Treasurer Tavares is automatically substituted as a party pursuant to Supreme Court Rule 35(3).

The National Education Association of Rhode Island ("NEA-RI"), Richard DeOrsey, Janice Lanik Quinn, and Vincent Santiniello were parties below, but are not Petitioners here.

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STATEMENT OF THE CASE

Petitioners seek review of the First Circuit's opinion in *National Education Association-RI, et al. v. Retirement Board, et al.*, 172 F.3d 22 (1st Cir. 1999) ("*NEA*"), a unique case that affects only their distinct interest in the Employees' Retirement System of the State of Rhode Island. ("Retirement System" or "ERS"). 172 F.3d at 25; Petitioners' Appendix at 7a.[1] This case begins in the 1980's with the quest for the passage of what became R.I. Gen. Laws § 36-9-33 (repealed 1988) (the "Union Pension Act)." 172 F.3d at 24; Pet. App. 2a-3a. Over two years, several Petitioners lobbied the General Assembly of Rhode Island ("General Assembly") for passage of this bill, but it died in committee.[2]

By 1987 the winds of political fortune had changed. Respondent DiOrio changed jobs, moving from NEA-RI to the State House to become Governor Edward DiPrete's Chief of Policy (and legislation). Respondent Press testified in favor of allowing DiOrio to purchase his prior union time toward a State pension. This time the bill was

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[1] References to Petitioners' Appendix are hereinafter designated "Pet. App."

[2] Petitioner **Edward McElroy**, then president of the Rhode Island Federation of Teachers ("RIFT") sought introduction of a union pension bill. Deposition of **McElroy** at 3-4, 28; Petitioner **Ronald DiOrio**, former president of NEA-RI, had discussed the concept and soon became aware of the legislation. Deposition of **DiOrio** at 33-41; *see* also **McElroy** Depo. at 28; **McElroy** met with Speaker **Matthew Smith** of the General Assembly's House of Representatives about introducing such legislation. **McElroy** Depo. at 29-30. In 1986 Petitioner **Robert Casey** from RIFT, and Petitioner **Harvey Press** from NEA-RI lobbied for the bill.

guaranteed success by being placed on the Consent Calendar when considered by both the House and Senate.[3] 172 F.3d at 24; Pet. App. 3a. With virtually no debate, the Union Pension Act "snuck" through on the last day of the 1987 legislative session.[4] 172 F.3d at 24; Pet. App. 3a. The Union Pension Act became law without the Governor's signature as 1987 R.I. Pub. L. ch. 613 and was codified at R.I. Gen. Laws § 36-9-33.

A political firestorm developed when the provisions of the Union Pension Act became known. During the next session of the General Assembly, the Union Pension Act was repealed by 1988 R.I. Pub. L. ch. 486. Petitioners were subsequently denied access to the ERS, and brought a State court action to determine the prospective nature of the repeal. 172 F.3d at 25. The union members were not permitted into the ERS until April of 1990, retroactive to

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[3] A bill can only be placed on the Consent Calendar with the approval of leadership of both parties in the House and the Senate.

[4] *See* the following remarks from the General Assembly's Hearing Re: Bill #94-H-9040: Remarks of **Rep. Lynch** at 28; "This was put on the consent calendar. We did not know who the names were. It was snuck right through"; Remarks of **Rep. Teitz** at 30; "I believe a serious mistake was made in 1987 when the original legislation allowing these individuals to purchase time in the pension system was passed. It was passed without adequate scrutiny or explanation."; Remarks of **Rep. Long** at 33; "[The passage of the Union Pension Act] was, in my opinion, a conspiracy of the highest nature in this building committed by members of the Legislative and Executive branch of Government by Democrats and Republicans; and the leaders in this building thought they slipped one by the people of the State of Rhode Island."; Remarks of **Rep. Carulo** at 40; "This [passage of the Union Pension Act] was done behind everyone's back."

January of 1990, by order of the State court. The ultimate effect of the Union Pension Act was to allow these private union officials to qualify almost immediately for State pensions – strikingly greater than their contributions – while never having worked a day of that time for the State. 172 F.3d at 24; Pet. App. 4a. The District Court calculated Petitioners' total contributions to the Retirement System for private union time at $1,995,748, with a then present value of projected pensions at $11,430,579, and an average rate of return of approximately 1250%. *Id.*

The First Circuit found that the ERS is a "defined benefit plan." 172 F.3d at 24; Pet. App. 2a. In such a plan, benefits are calculated not on the amount contributed, but on a schedule based on years of service. R.I. Gen. Laws § 36-10-10. 172 F.3d at 24; Pet. App. 2a. State employees may retire and begin receiving payments at any age after 28 years of service, or after reaching the age of 60 with 10 years of service. R.I. Gen. Laws § 36-10-9. 172 F.3d at 24; Pet. App. 2a. A pension benefit is determined by taking the average of the three highest consecutive years of earnings multiplied by the years of credited service. R.I. Gen. Laws § 36-10-10. 172 F.3d at 24; Pet. App. at 2a. The Union Pension Act allowed Petitioners to increase their private union salaries, thus boosting their public pensions without State control. 172 F.3d at 24 n.2; Pet. App. at 3-4a n.2. The net result was an incredible windfall due to Petitioners' manipulation of the Retirement System.[5]

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[5] Petitioner **Bernard Singleton** purchased 25 years of union time at a cost of $25,411 after serving only eighteen months as a State employee. He retired in July of 1990 with a pension of

Ultimately, the General Assembly passed the Eviction Act to correct the errant policy that had slithered through. *See* 1994 R.I. Pub. L. ch. 413, § 1, codified at R.I. Gen. Laws § 36-9.1-1 et seq. The Eviction Act only removes Petitioners' union time from the ERS. *Id.*

Indeed, *NEA* recognized the "eccentric facts" of this case. 172 F.3d at 26; Pet. App. 7a. The First Circuit considered Petitioners' Contract Clause challenge and reviewed Rhode Island's pension laws. The appellate court found no language of contract in the statute. 172 F.3d at 28; Pet.

$53,000 per year, and an estimated lifetime benefit of $750,000. Petitioner **Bernard F. Connerton** contributed $27,072, retiring in July of 1990 at age 53 with an estimated benefit of almost $640,000. Petitioner **Gloria Heisler** retired after 20 years of teaching in July of 1990. Based on the Union Pension Act she purchased almost 15 years of union time that ended in 1965 for $2,241 to receive an increase of $15,160 per year to her teachers pension. **Heisler's** estimated lifetime gain was $222,202 for an unimaginable lifetime return of 9911%. Petitioner **McElroy** contributed $34,385 to retire in November of 1992 at the age of 51 with an estimated lifetime benefit of approximately $550,000. Petitioner **Edward Casey** contributed $28,351 and then retired in December of 1992 at age 56 with an estimated lifetime return of more than $650,000. Petitioner **Joseph Grande** retired in 1993 after purchasing 22 years of credit for $33,827 for an estimated lifetime return of $628,850. *See* Affidavit of Arthur Anderson 9/13/94; Affidavit of James Reilly 9/12/94; and 172 F.3d at 25 n.3; Pet. App. at 4-5a n.3. Petitioner **DiOrio** stipulated to the fact that he was not eligible to retire prior to the Eviction Act. Nonetheless, at age 50 he managed to receive pension benefits based on a contribution of $23,542 beginning in July of 1990 until July of 1994 totaling $162,835.85. **DiOrio** was indicted for obtaining money under false pretenses based on his entry and receipt of ERS benefits. On July 23, 1999 he was found not guilty after a bench trial.

App. at 10-11a. The court did not "think that references in the statute to 'vesting' create[d] a contract." 172 F.3d at 28; Pet. App. 11a. The court differentiated between the question of vesting, "the period an employee must work to become eligible for a pension," and "whether a plan offers contractual protection against a change in its terms as a different question." *Id.* The First Circuit did "not think that the Rhode Island general pension statute 'clearly and unequivocally' contracts for future benefits either by language or – *in the circumstances of this case – through the nature of the relationship.*"[6] 172 F.3d at 28-29; Pet. App. 10a-13a. (emphasis added)

Judge Boudin, writing for a unanimous court, then turned to the circumstances of this case and found:

> The existence of an employee-employer relationship does weigh in favor of finding an implied contract, as the non-governmental pension cases made clear. *See McGrath*, 88 F.3d at 17 (summarizing case law). However, the force of this consideration is very much muted in this case: these particular Petitioners do not have the benefit of a clear and longstanding employer-employee relationship with the government – they are far from the quintessential ten (10) or twenty-eight (28) years-of-service government employees.

172 F.3d at 28-29, Pet. App. 12a.

The First Circuit explicitly "decline[d] to decide now whether this last consideration [the existence of an

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[6] Petitioners' fail to acknowledge their unique circumstance, the "lack of employer-employee relationship" with the State, as the basis for the First Circuit's Contract Clause decision. Petition at 8 and 9.

employee-employer relationship] would tip the balance if, for example, Rhode Island took a meat ax to the pensions of long-time State employees." 172 F.3d at 29; Pet. App. 12a. Since the Rhode Island pension statute does not "clearly and unequivocally" create a contract by its expressed language, the appellate court "happily deferred" the "conundrum of a 'statutory' contract that may meet this requirement by clear implication rather than clear language." 172 F.3d at 29; Pet. App. 13a. The court reasoned that:

> Here, the class of persons who have been "evicted" are individuals who were never public employees – at least in the capacity for which the State pensions are sought – and were permitted to enter the system at bargain-basement prices while retaining their pensions as union employees. The discrepancy between what they contributed as a class and what they might expect in pensions was striking. And almost at once, they were warned of legislative efforts to undue their unusual benefits. The first such attempt (the Repeal Act) was frustrated in state court, but the Eviction Act followed hard on its heels.

172 F.3d at 31; Pet. App. at 17a.

NEA held that prospective pension payments were not required under the Contract Clause – "at least as to these 'last minute entrants.' " 172 F.3d at 30; Pet. App. 15a. The First Circuit specifically limited its holding to these particular Petitioners, deferring to the General Assembly the determination of what rights public employees may have in their Retirement System. 172 F.3d at 30; Pet. App. at 17a-18a. Respondents submit that the

facts relevant to this Petition are found in the *NEA* decision of the First Circuit, and request that this Court reject Petitioners' additional factual conclusions unsupported by the record.

SUMMARY OF ARGUMENT

There is no reason for this Court to grant Petitioners' application for Writ of Certiorari. This Petition only involves the remaining 13 persons, and one union, who were found to be properly evicted from one state's retirement system. Indeed the "eccentric" facts of this pension case are due to the Petitioners' unusual circumstances. Petitioners seek public pensions for private union employment that began, and in some instances ended, long before the passage of the Union Pension Act. Instead of engaging the sweeping arguments made by Petitioners, the First Circuit appropriately left to the General Assembly of Rhode Island the question of what rights State employees have in their Retirement System. What rights public employees may have in their various retirement systems, including Rhode Island's public employees, is not at issue here. Thus further review will not impact anyone, save those Petitioners that approach this Court. Finally, the First Circuit correctly applied the well-settled Contract Clause analysis to Petitioners' claim and found that they were constitutionally evicted from the Employees' Retirement System of the State of Rhode Island.

ARGUMENT

I. There Is No Compelling Reason To Grant Certiorari.

Rule 10 of the Supreme Court Rules provides that a writ of certiorari will be granted *only* for compelling reasons. A petition is rarely granted when the asserted error consists of erroneous factual findings, as is the case here. There is no compelling reason to grant review. This case only concerns the pension trust fund created for Rhode Island's public employees. Petitioners continue to masquerade themselves as public employees, attempting to obtain what they did not earn, public pensions for time spent as private union employees. Petitioners were never public employees for the private union time evicted from the Retirement System. 712 F.3d at 31; Pet. App. at 17a-18a. The Union Pension Act, which allowed Petitioners into the ERS, was subsequently repealed.

This Court has considered why certiorari was inappropriate in a case unlikely to occur again in *Rice v. Sioux City Memorial Park Cemetery*, 348 U.S. 880, *cert. dismissed as improvidently granted*, 349 U.S. 70 (1955) ("*Rice*"). In *Rice* a statute was amended that barred the claim from arising again, as in the instant case. In dismissing the writ, Justice Frankfurter wrote:

> A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues

> involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion. (citations omitted).

349 U.S. at 74.

The Court reasoned:

> . . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the . . . Courts . . . (citations omitted).

349 U.S. at 79.

Thus given the unique factual perspective, this case stands alone from every other public pension case. More importantly, this case only involves Petitioners, not the rights of the 19,000 retired or the 34,000 active public employee members of our Retirement System.

Petitioners overlook their distinct "circumstances" and the limited reach of the *NEA* decision below to ask this Court for a ruling that would affect over "2000 governmental retirement system, with more than ten million members." (Petition at 10). Petitioners' request, in a Contract Clause claim as to one state's pension plan, is inconsistent with the requisite inquiry of such a challenge – to review "the specific terms of the statute supposed to create such a contract." *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 104 (1938). Further, Petitioners ask this Court

to entertain the very issue which the First Circuit "happily deferred;" *i.e.*, whether and under what circumstances the ERS establishes a contractual relationship with its long-term public servants. (Petition at 10-11). The First Circuit exercised appropriate judicial restraint and declined to engage in needless speculation.

Moreover, Petitioners' contention that *NEA* is somehow inconsistent with other First Circuit decisions is misplaced. The First Circuit reviewed the holding in *McGrath v. Rhode Island Retirement Board*, 88 F.3d 12 (1st Cir. 1996), stating: "The theory is that the plan is an offer and the employee, by working for many years pursuant to the plan, has relied on and accepted the offer, which cannot now be changed unilaterally as to a vested employee, whether still working or retired." 172 F.3d at 27 (*citing McGrath* at 17); Pet. App. 8a. To support this general proposition, *McGrath* recognized that "the promise of a pension constitutes an offer which, upon performance of the *required service* by the employee[,] becomes a 'binding obligation.' " 88 F.3d at 17 (*quoting Hoefel v. Atlas Tack Corp.*, 581 F.2d 1, 4-5 (1st Cir. 1978) (emphasis added)). *McGrath* was also mindful of the special employment environment for public employees due to the "very nature of a republican form of government." 88 F.3d at 20. The unilateral public pension contract in *McGrath*, however, was based on public service rendered. Even in *Hoefel*, a private sector pension case, Plaintiffs were retired Atlas employees. Here, Petitioners' claim in our public pension system is for private union employment. Without public service, they have no contract, unilateral or otherwise, based upon the Union Pension Act.

NEA found that an implied-in-fact unilateral contract was not created, since Petitioners "did not have the benefit of a clear and longstanding employee-employer relationship" with the government for the payment of future benefits. 172 F.3d at 28-29; Pet. App. 12a. The First Circuit held that future benefits were not contractually obligated "to these 'last-minute' entrants." 172 F.3d at 30; Pet. App. 15a. *NEA's* holding is based on a firm understanding of Rhode Island's defined benefit plan. The cornerstone of our Retirement System is the premise that the receipt of a pension can only be based on long-term public service. Indeed, the ERS funds itself through long-term employment, with contributions that are invested over time, to culminate in pensions for generations of members.

Furthermore, the Union Pension Act did not, by express language or implication, include the union employees in the Retirement System under a contract of employment. State employees, however, are members of the ERS "under contract of their employment" with the State. R.I. Gen. Laws § 36-9-2. Likewise, the statutory definition of an employee in the ERS is an "employee of the State of Rhode Island." R.I. Gen. Laws § 36-8-1(8). That definition never included union employees. Thus, the Union Pension Act never specifically equated union time with service to the State.

In a more recent decision, the First Circuit determined that former Rhode Island legislators or their spouses could not establish a sufficient employee-employer relationship to prevail on a Contract Clause challenge for retirement benefits. *Parella v. Retirement Board of Rhode Island Employees Retirement System*, 173 F.3d 46 (1st Cir. 1999). Among other reasons, *Parella* found that

the pension seekers did not "stand in the classic employer-employee relationship with the State." 173 F.3d at 61. Again, the court reviewed the Rhode Island pension statute and stated that "[p]articipating Plaintiffs bringing particular Contract Clause claims based upon the Rhode Island pension statute may find themselves in markedly different circumstances." *Id.* The First Circuit found that the statute did not create a binding contractual obligation for the legislators, and also created federal tax code problems for the Retirement System, similar to *NEA*. 173 F.3d at 62. *Parella* concluded that the Plaintiffs there "had none of the indicia of a true pension" and denied their claim. *Id.*

Despite Petitioner's insistence, the circumstances of their Contract Clause challenge are factually and analytically distinct from the public employee members of the Retirement System. (Petition p. 12). *See Parella* 173 F.3d at 61 (noting plaintiffs in *NEA* and *Parella* do not resemble "hypothetical" claim of long-term state employee). Thus, there is no conflict between First Circuit opinions. Accordingly, there is no compelling reason for this Court to accept this case for review, and this Petition should be denied.

II. Petitioners' Request To Review This Court's Decision In *Pennie v. Reis* Has No Application To The Case At Bar.

Petitioners request that this Court review *Pennie v. Reis*, 132 U.S. 464 (1889), a case involving a Due Process

challenge,[7] and the "gratuity model" of a pension plan, to determine if it has any "continuing validity." (Petition at 14). The First Circuit did not consider *Pennie* in deciding Petitioners' Contract Clause challenge. Indeed, Petitioners' can only assert that the First Circuit "presumably" took this approach. (Petition at 15). They are mistaken. This request is no more than an "academic" exercise that is of no consequence to the present matter. *See Rice, supra.*

NEA properly considered the basis for a Retirement System pension, reviewing Rhode Island's pension statutes and case law, in particular, *Matter of Almeida*, 611 A.2d 1375 (R.I. 1992).[8] There, the Supreme Court of Rhode Island declined to categorize a noncontributory public pension as a gratuity. 611 A.2d at 1385. In *Almeida*, the court determined "that a public pension comprises elements of both the deferred compensation and contract theories," reasoning:

> The right to deferred compensation vests upon meeting the terms of employment, but the vesting is subject to divestment because it is conditioned on continued honorable and faithful service. We need not distinguish between the contributory and the non-contributory natures of a public pension because vesting is continually subject to the implied conditions of good

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[7] Petitioners did not pursue their Due Process claim on appeal to the First Circuit, or here. (Petitioner at 9 n.9).

[8] *Almeida* concerns the Committee on Judicial Tenure and Discipline's recommendation to revoke former Superior Court Associate Justice Antonio Almeida's pension after he was found to have taken bribes. *Id.* at 1378-79.

> behavior and honorable service in all areas of public service. These prerequisites must be satisfied to receive a pension and are quintessential for one employed in public service, especially as a judge. Vesting of the amount to be paid by the state in pension as deferred compensation is therefore subject to suspension, in a manner similar to the requirements for receiving compensation.

611 A.2d at 1386.

Almeida found honorable and faithful service is "a necessary condition precedent" for receipt of a public pension. 611 A.2d at 1387. Rhode Island's high court "declined to expressly categorize" the right to a state pension "once the employment contract is signed." 611 A.2d at 1385-86. Likewise, *McGrath* recognized the significant disagreement as to when contractually enforceable rights accrue in state and municipal pension plans. 88 F.3d at 17. Because Petitioners cannot establish a long-term employer-employee relationship culminating in a pension, they are forced to argue for a contract at the beginning of the employment relationship. *Almeida* does not support this contention. Moreover, Petitioners cannot fulfill the condition precedent of public service. They never had that relationship.

Petitioners argue further that there is a conflict among lower federal and state courts, and that a "great diversity" exists as to when contractual rights accrue in the various state retirement systems. (Petition at 15-18). This "diversity" can be attributed to the different statutes that created these systems and the legislative intent behind them. Petitioners, to "some extent," concede that

point. (Petition at 18). In any event, the teachings of a recent First Circuit decision are equally applicable here. *See Parker v. Waklin*, 123 F.3d 1 (1st Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 1675 (1998). *Parker* involved a Contract Clause challenge by Maine public school teachers who, although not retired, incurred a reduction in benefits payable upon retirement. The First Circuit concluded that a "blanket answer to the issue of Contract Clause protection for vested employees is not possible, because, . . . a detailed examination of the particular provisions of a state pension program will be required prior to determining the nature and scope of the unmistakable contractual rights, if any, that are created by a given state legislature." 123 F.3d at 4. Applying the teachings of *U.S. v. Winstar*, 518 U.S. 839 (1996) and *McGrath*, the court:

> Eschewed participating in abstract contract theory in favor of performing a close analysis of the statutory provision at issue. Such an approach is wise, because the unmistakability doctrine mandates that we determine whether the challenged legislative enactment evinces the clear intent of the state to be bound to particular contractual obligations.

123 F.3d at 7.

Only Rhode Island's pension system is involved in this case. A pronouncement by this Court in a Contract Clause case cannot prevent a state from determining when rights accrue within its own pension plan. Petitioners' request for guidance from this Court, in view of the disparate nature of the "2,000 state and local government retirement systems in existence, with more than ten

million members," is wholly without merit. (Petition at 10).

III. The First Circuit Properly Considered And Denied Petitioners' Contract Clause Challenge To The Eviction Act.

Petitioners concede, as they must, that *NEA* correctly identified the "applicable [Contract Clause] standard." (Petition at 19). The First Circuit considered the following passage from *National Railroad Passenger Corp. v. Atchison, Topeka and Santa Fe Railway Co.*, 470 U.S. 451, 465-66 (1985) ("*National Railroad*"):

> For many decades, this Court has maintained that absent some clear indication that the legislature intends to bind itself contractually, the presumption is that 'a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.' This well-established presumption is grounded in the elementary proposition that the principal function of a legislature is not to make contracts, but to make laws that establish the policy of the state. Policies, unlike contracts, are inherently subject to revision and repeal, and to construe laws as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative body.

470 U.S. at 465-66 (internal citations omitted).

Additionally, "the party asserting the creation of a contract must overcome this well-founded presumption. . . . " *Id.* at 466 (*citing Dodge v. Board of Education*, 302

U.S. 74, 79 (1937)) ("*Dodge*"). To determine whether such a contract exists, "the cardinal inquiry is as to the terms of the statute supposed to create such a contract." 470 U.S. at 466 (*citing Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 104 (1938)) ("Brand"). This Court has stated that, "[i]n general, a statute is itself treated as a contract when the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the State." *United States Trust of New York v. New Jersey*, 431 U.S. 1, 17 n.14 (comparing *Dodge* and *Brand, supra*). *See also Hoffman v. City of Warwick*, 909 F.2d 608, 614 (1st Cir. 1990) (Statute providing enhanced seniority in employment for veterans did not contractually bind state or municipalities, thus repeal did not violate Contract Clause.). Even further, the "unmistakability doctrine" requires that the legislative intent to create a contract must be, in a word, unmistakable. *U.S. v. Winstar*, 518 U.S. 839, 871-72 (1996).

As discussed above, *NEA* properly determined that the Union Pension Act did not establish a contract between the Retirement System and the Petitioners. Clearly, this controversy does not involve a statutory contractual offer. The language of the Union Pension Act is too indefinite to create a contract. Moreover, the Union Pension Act does not contain the words "contract," "consideration," "reliance," or "acceptance," nor does it express terms of mutual obligations, duties and rights.

The absence of contract language demonstrates that the Union Pension Act is a declaration of policy, subject to modification by a succeeding session of the General Assembly. *See Winstar*, 518 U.S. at 872 (discussing *Blackstone's Commentaries*, stating "the centuries old concept

that one legislature may not bind the legislative authority of its successors"); *National Railroad, supra; Retired Adjunct Professors v. Almond*, 690 A.2d 1342 (R.I. 1997). Thus the Union Pension Act did not create a contract by its express language, or by implication. Accordingly, the absence of a contract defeats Petitioners' Contract Clause claim.

In *Retired Adjunct Professors* the Supreme Court of Rhode Island considered a Contract Clause challenge by retired educators to a statutory amendment that suspended pension benefits upon acceptance of State reemployment. The court held the statute did not create any right cognizable under the Contract Clause of either the Federal or State Constitutions.

Retired Adjunct Professors reasoned that "[i]n the determination of whether public-contract rights exist, the most important fact is legislative intent as it is expressed in the language of the statute." 690 A.2d at 1346 (citing *National Railroad*, 470 U.S. at 466 and *Brennan v. Kirby*, 529 A.2d 633, 639 (R.I. 1987)). The court stated that "there is a strong presumption against construing a statute to create such contractual obligations, and individuals alleging its creation bear the heavy burden of overcoming this presumption." 690 A.2d at 1345. Rhode Island's high court also recognized it must avoid " 'play[ing] havoc with basic principles of contract law, traditional contract clause analysis, and most importantly, the fundamental legislative prerogative to reserve to itself the implicit power of statutory amendment and modification.' " 690 A.2d at 1346 (*quoting Pineman v. Oechslin*, 195 Conn. 405,___, 488 A.2d 803, 808 (1985)).

As to issues of reliance and estoppel, *Retired Adjunct Professors* held that even though plaintiffs may have relied on the then-existing statute:

> They were not entitled to conclude that these provisions were fossilized in legislative amber. . . . Mere reliance by benefited parties on legislative enactments and their unilateral beliefs concerning what the statute will mean to them in the future, no matter how reasonable they may seem at the time, cannot create a legislative intent to establish enforceable contractual rights that is not otherwise manifest in the words of the legislation. . . . In applying this concept, courts have consistently refused to give effect to government-fostered expectations that, had they arisen in the private sector, might well have formed the basis of a contract or an estoppel. . . . Thus notions of promissory estoppel that are routinely applied in private contractual contexts are ill-suited to public-contract rights analysis.

690 A.2d 1345-46 (*quoting Pineman v. Fallon*, 662 F. Supp. 1311, 1316 (D. Conn. 1987), *aff'd*, 842 F.2d 598 (2d Cir.), *cert. denied*, 488 U.S. 824 (1988)).

Turning to Petitioners' "circumstances," they are unlike the public servants in any other public pension case. These private union employees do not have the underlying employer-employee relationship of public service – the foundation of a claim to a public pension. The First Circuit in *Parella* made the circumstance of the *NEA* case clear, stating:

> In NEA, we contrasted the Plaintiffs' claim with a hypothetical claim brought by a quintessential 10 or 28 year of service government employee

> whose pension benefits had been radically reduced. Without deciding the question, we noted that such circumstances presented a very different Contract Clause claim. 173 F.3d at 61.

The First Circuit's determination concerning the specific circumstances of these particular Petitioners was correct, and should be allowed to stand.

Finally, not one of these Petitioners can legitimately claim any inducement for employment from "the promise of a pension [as] part of the compensation package" that was "dangle[d] to attract and retain qualified employees." *McGrath*, 88 F.3d at 16-17. (Petition at 20). Every one of them was already employed when they were finally allowed into the ERS in April of 1990. Of the seven Petitioners who received pension benefits, four received retirement benefits almost immediately. The only attraction for the retired Petitioners was a windfall they never could have legitimately anticipated when their employment began. As to the other Petitioners, they were in the Retirement System under the Union Pension Act for only four years. The argument that these benefits were "dangled to attract and retain" these Petitioners is not only misplaced, it is disingenuous. (Petition at 20). The question presented by Petitioners is an affront to every hardworking public employee, who contributes on a daily basis through public service and contributions to the Employees' Retirement System, and to the people of the State of Rhode Island.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE
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DIANA CASEY, *et al.*,
Petitioners,

v.

RETIREMENT BOARD OF THE RHODE ISLAND EMPLOYEES' RETIREMENT SYSTEM, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

ARGUMENT

Petitioners' request for review of the Question Presented —whether employees who are members of a state retirement system that does not expressly indicate whether or not a contractual relationship is established ever can acquire a right to retirement benefits that is protected by the Contract Clause—is bottomed on two basic propositions.

A. The first proposition is that this Court's decision in *Pennie v. Reis*, 132 U.S. 164 (1889)—which answered the question "no"—is fundamentally inconsistent with this Court's modern Contract Clause jurisprudence, and should be overruled. Petition ("Pet.") at 14-15. In the passing reference that they make to *Pennie* in their Brief in Op-

position ("Opp. Br."), respondents do not take issue with this proposition, *see* Opp. Br. at 12-13, and, accordingly, there is no need for us to address it further.

B. The second proposition underlying our request for review is that there is significant conflict among the state courts of last resort and federal courts of appeals that have addressed this question of federal law. Pet. at 15-18. This proposition likewise is not challenged by respondents. *See, e.g.*, Opp. Br. at 14 ("*McGrath* [*v. Rhode Island Retirement Bd.*, 88 F.3d 12, 17 (1st Cir. 1996)] recognized the significant disagreement as to when contractually enforceable rights accrue in state and municipal pension plans."); *id.* at 6, quoting from App. at 13a ("[T]he appellate court 'happily deferred' the 'conundrum of a "statutory" contract that may meet this requirement by clear implication rather than clear language.' ") Respondents contend, however, that this does not provide an adequate basis for this Court to grant review. According to respondents, the decision of the court below stands apart from the conflict, because this is "a unique case that affects only [petitioners'] distinct interest in the Employees' Retirement System of the State of Rhode Island." Opp. Br. at 1.[1] That simply is not so.

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[1] Respondents contend and—with a noteworthy flair for hyperbole—attempt to demonstrate that the "Union Pension Act"—*i.e.*, the statute pursuant to which petitioners acquired the retirement benefits that are at issue in this case—was an "errant policy," Opp. Br. at 4, that "slithered" through the Rhode Island Legislature. *Id.* Respondents significantly distort both the substance of the statute and its legislative history, *see* Pet. at 3, but it would serve no purpose to debate these points here. Even if we assume, *arguendo*, that the legislature was ill-advised to have enacted the Union Pension Act in the first place, there is no dispute about the fact that the statute was *validly enacted*. That reality—rather than political hindsight—is the relevant consideration for purposes of constitutional analysis.

1. Respondents argue that "[t]he First Circuit specifically limited its holding to these particular Petitioners," *id.* at 6, and "[w]hat rights public employees may have in their various retirement systems, including Rhode Island's public employees, is not at issue here." *Id.* at 7. Respondents fail to appreciate the full implications of the decision of the court below.

In the Petition, we acknowledged that the First Circuit purported to leave open the possibility that petitioners' rights to retirement benefits might be of a lesser quality than those of "long-time state employees," on the ground that "these particular plaintiffs do not have the benefit of a clear and long standing employer-employee relationship *with the government.*" Pet. at 12 n.14 (quoting App. at 12a) (emphasis in original). As we explained, however, this "purported distinction is untenable . . . [and] the First Circuit's analysis necessarily applies to all members of the Retirement System at issue in this lawsuit, and more generally to public employee members of other state retirement systems as well." Pet. at 12 n.14.[2]

2. Moreover, although the First Circuit asserts at the conclusion of its decision that "[i]t reserves, once again, the very difficult case of the long-time vested or eligible employee whose benefits might be curtailed," Pet. at 17a,

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[2] Specifically, we noted the following points:

> All of the petitioners had an "employer-employee relationship" with an entity that the Rhode Island legislature, in enacting § 36-9-33, determined should be treated as a public employer for purposes of the Retirement System. That employment relationship—alone or in combination with other covered employment—was sufficiently "longstanding" for all of the petitioners to have obtained the requisite ten years of service for their retirement benefits to become vested. . . . [T]here is, thus, no conceivable legal basis for analyzing petitioners' rights under the Retirement System any differently from those of other members of the System, . . .

Pet. at 12, n.14.

the constitutional principles that inform the court's analysis at the very least qualify this reservation. Thus, for example, although many courts have held that retirement benefits are contractually protected when they become "vested," *see* Pet. at 17, the First Circuit did not "think that references in the [retirement] statute to 'vesting' create a contract." App. at 11a. Similarly, the court below concluded that, because "the statute [does not] call the pension plan a 'contract' or contain an anti-retroactivity clause as to future changes," App. at 11a, "it falls at least a step short of clearly expressing a contractual commitment not to change benefit levels or other plan variables by legislation." *Id.* These and other of the First Circuit's conclusions obviously do not "affect[] only [petitioners'] distinct interest in the" Retirement System, Opp. Br. at 11, but "necessarily appl[y] to all members of the Retirement system at issue in this lawsuit, and more generally to public employee members of other state retirement systems as well." Pet. at 12 n.14.

3. As indicated, the court below observed that the outcome might be different if this case involved "longtime state employees," who had "the benefit of a clear and longstanding employer-employee relationship *with the government*." App. at 12a (emphasis in original). Far from constituting "the basis for the First Circuit's Contract Clause decision," as respondents contend, Opp. Br. at 5 n.6, the First Circuit "decline[d] to decide" whether that distinction would lead to a different result. *Id.* Thus, the decision reflects the lower court's uncertainty as to how—if at all—the duration of and/or parties to the employer-employee relationship may be relevant in determining whether a public employee has a contractual right to his or her retirement benefits.[3]

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[3] The First Circuit's subsequent suggestion that only "ordinary full-time employees" may have a contractual right to retirement

Having elsewhere said that "rights gained by service and rights gained by purchase are 'equal in statute' within the [Rhode Island] system," *McGrath v. Rhode Island Retirement Board*, 88 F.3d 12, 20 (1st Cir. 1996), the First Circuit plainly was *not* suggesting in this case that service for the government is the *sina qua non* in determining whether retirement benefits acquired under a state retirement system should be accorded contractual status. Nor is there any apparent reason why that should be so. Numerous states, and the federal government, have determined that service for a union that represents the government's employees—like service for the government itself—should qualify an individual for retirement benefits. *See* Pet. at 3. Many states, including Rhode Island, also credit other types of employment, such as military service (R.I.G.L. § 36-9-31) and private school teaching (§ 36-9-20.1).

It therefore is not surprising that the First Circuit was nor prepared to adopt a rule that only a "longstanding employer-employee relationship with the government," Opp. Br. at 14, 19, can suffice to confer contractual status on the benefits an individual is entitled to receive from a state retirement system. Respondents, however, do not share the First Circuit's uncertainty in this regard. To the contrary, they unhesitatingly posit such a relationship as the *sine qua non* for the existence of contractual rights. *Id.* But there is nothing in this Court's Contract Clause jurisprudence to support that position, and it certainly is not a position that has been embraced by the other courts that have addressed this question. *See* Pet.

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benefits under a state retirement system, thus excluding the benefits of *legislators* from Contract Clause protection, *see Parella v. R.I. Employees' Retirement System*, 173 F.3d 46, 61 (1st Cir. 1999), demonstrates further the absence of clear standards in the First Circuit's analysis.

at 15-17. Indeed, respondents' very suggestion that this type of ill-defined and largely amorphous criterion provides—and even the First Circuit's suggestion that it *might* provide—the basis for determining whether millions of public employees can rely on the retirement benefits to which they are entitled under existing law, serves only to underscore the need for contemporary guidance from this Court.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Petition, the Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit should be granted.

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